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No. 97-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

REX W. CUNNINGHAM, JR.,
THOMAS FERRIS, and BRIAN HOYLE
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

1. (a) Can a facially deficient electronic surveillance warrant under Title III's particularity provisions, 18 U.S.C. §§ 2518(4)(b) and (c), be corrected by importing judge-made exceptions to the Fourth Amendment's exclusionary rules into Title III's exclusionary rules, 18 U.S.C. §§ 2515, 2518(10)(a)?

(b) In reversing the district court's Title III suppression order on legally novel grounds not raised below, did the court of appeals exceed its "plain error" jurisdiction set forth in United States v. Olano, 507 U.S. 725 (1993)?

2. Was it objectively unreasonable for a state prosecutor to delay sealing electronic surveillance materials in 1992 for the sole reason that he had "never read the federal statute" and had "never heard of" United States v. Ojeda Rios, 495 U.S. 257 (1990)?

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[1] **LIST OF ALL PARTIES**

The caption of the case in this court contains the names of all parties to this petition.

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IN THE SUPREME COURT OF THE UNITED STATES
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REX W. CUNNINGHAM, JR.,
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Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REX W. CUNNINGHAM, JR., THOMAS FERRIS AND BRIAN HOYLE respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit reversing an order of the United States District Court, District of Massachusetts, suppressing evidence.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is published as United States v. Cunningham, 113 F.3d 289 (1st Cir. 1997). It is Appendix A to this petition. The Order of that court denying a petition for rehearing is Appendix B. The order of the United States District Court, District of Massachusetts, allowing petitioner's motion to suppress evidence is Appendix C. That court's denial of the government's motion for reconsideration is Appendix D. Its refusal to change its suppression order after reconsideration is Appendix E.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1997. Its order denying Petitioners' petition for rehearing was entered on June 4, 1997. Petitioner invokes this court's jurisdiction under 28 U.S.C. § 1254(1)(1997).

STATUTES INVOLVED

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. 90-351, codified at 18 U.S.C. §§ 2510-2521, as amended by Pub. L. No. 99-508 (1986), provides, in pertinent part:

> **§ 2515. Prohibition on use as evidence of intercepted wire or oral communications.**
> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial ... in or before any court of the United States ... if the disclosure of that information would be in violation of this chapter.
>
> **§ 2518. Procedure for interception of wire, oral or electronic communications.**
> * * *
> (4) Each order authorizing or approving the interception of any . . wire, oral, or electronic communication under this chapter shall specify--
> * * *
> (b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted; [and]
> (c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates[.]
> * * *

(10)(a) Any aggrieved person in any trial ... before any court ... of the United States ... may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that--
(i) the communication was unlawfully intercepted;
(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
(iii) the interception was not made in conformity with the order of authorization or approval.

STATEMENT OF THE CASE

The opinions below contain all the facts and rulings relevant to the issues presented in this petition. A2-A4, A15-A22, A45-A46, A50-A51. We summarize those facts and rulings.

Between May 20, 1992, and November 1, 1992, possessed of electronic surveillance orders issued by a Massachusetts Superior Court judge, state police monitored the defendants' oral communications by means of a bug installed in Mr. Cunningham's Springfield place of business, Dillon's Tavern. The United States sought to use this state-gathered evidence in the present RICO prosecution.

On May 17, 1996, the district court (Freedman, S.J.) granted the defendants' motion to suppress this evidence on the grounds that the primary order, on which all subsequent orders depended, was "insufficient on its face." 28 U.S.C. § 2518(10)(a)(ii). A42-A43.

The government filed an interlocutory appeal and, on May 19, 1997, a panel of judges reversed the suppression order. On June 4, 1997, petitions for rehearing and for rehearing in banc were denied.

The motion to suppress was grounded solely in Title III's statutory exclusionary rules, 18 U.S.C. §§ 2515, 2518(10)(a), and not on any judge-made exclusionary rules applicable to Fourth Amendment violations.

Every judge who has reviewed this Order concluded that it is facially defective, since an objective reader could not reasonably

determine whether it authorized a wiretap or a bug.

The district court ordered the Dillon's interceptions and all derivative evidence suppressed because:

> [the court] cannot state that a reasonably prudent officer, reading the warrant with some diligence, would conduct the mental gymnastics that the government undertakes in eighteen pages of rationalizing and conclude that oral interception, and not wire interception, was authorized. . . .
>
> Nor does the court believe that the sloppy wording . . . amounts to a mere technical violation of Title III. Rather, the Court cannot help but to wonder whether [the issuing judge] was misled as to the type of communications which were to be intercepted. . . .A.D.A. Picknally's application contained numerous references to wire communications.... Moreover, District Attorney Bennett's attestation at the end of the application declared, "The proposed use of electronic surveillance relative to telephones (413) 531-4994 and (413) 531-3188 is consistent with the overall policy followed in Hampden County to eliminate this type of illegal gaming combine. ." Finally, the Court cannot accept that [the issuing judge] fully understood that the surveillance was limited to oral communications in light of the fact that she ordered New England Telephone Company to provide law enforcement personnel the technical assistance they needed in regard to the telephone at Dillon's Tavern with assigned number (413) 739-9212. A42.

As a preliminary matter, the appellate panel agreed that the primary order was facially defective, as follows:

> By referring randomly to oral communications and wire communications or wiretaps, the warrant is garbled on the very questions posed by [18 U.S.C. §§ 2518(4)(b) and (c)]. Taken as a whole--but taken alone and without extrinsic evidence--the warrant does not tell the objective but ignorant reader just what

> interceptions are to be targeted. . . .[T]he confusion is serious, and despite the government's linguistic acrobatics, this is not a warrant that we would deem adequate if it were signed by a judge and executed by a police officer having no other knowledge of the background and objectives. . . . [S]tanding alone, the bare inconsistent words of the warrant fail to create reasonable assurance that the signer or reader would know just what was intended. A4-A9.

The panel thus recognized that the order lacked particularity both as to "the nature. . .of the communications facilities as to which. . .authority to intercept is granted" and as to "the type of communication sought to be intercepted." 18 U.S.C. §§ 2518(4)(b) and (c).

Applying the reasoning of a single Fourth Amendment case--United States v. Bonner, 808 F.2d 864 (1st Cir. 1986)--to Title III's exclusionary rules, the panel found that this facially defective order, lacking the requisite statutory particularity, was nonetheless acceptable under Title III because of its conclusion (contrary to that of the district court, A42) that "the judge and the executing officer knew what had been proposed and authorized." A8-A11.

Additionally, the panel created this significant and far-reaching new Title III law under the rubric of "plain error." A6-A7.

It also endorsed a seven-day sealing delay based solely on a state prosecutor's confessed ignorance of this court's jurisprudence. 18 U.S.C. § 2518(8)(a). A13, A36.

REASONS FOR GRANTING THE WRIT

I. Whether courts may incorporate judge-made Fourth Amendment jurisprudence into Title III's statutory exclusionary rules presents an important question of federal law on which the courts of appeals are in conflict.

a. Based on dictum from a single, inapposite case from the D.C. Circuit, the panel held that violations of central provisions of Title III do not always require suppression.

Congress provided for mandatory suppression of intercepted oral communications where, as here, "the order of authorization or approval under which it was intercepted is insufficient on its face." 18 U.S.C. § 2518(10)(a)(ii).

The court of appeals recognized that this order "standing alone" and "without extrinsic evidence" was deficient since it did "not tell the objective. . . reader just what interceptions [were] to be targeted." A8-A9. This problem is "serious," the court realized; but for certain extrinsic evidence, it held that "this is not a warrant that we would deem adequate." A5, A8.

In holding that the issuing judge's and executing officer's knowledge rescued a facially bad Title III order, the panel misapprehended the law surrounding Title III's exclusionary rules.

In addition to the provisions requiring suppression for facially deficient orders, these rules also require suppression when a "communication was unlawfully intercepted." 18 U.S.C. § 2518(10)(a)(i). This subsection requires suppression for all violations of provisions which "play 'a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance.'" United States v. Donovan, 429 U.S. 413, 437 (1977), quoting United States v. Chavez, 416 U.S. 562, 578 (1974). Title III demands "strict adherence" to its central provisions. Donovan, supra, at 440.

As the district court noted, the government has never disputed that Section 2518(4)(b) is such a central provision of Title III, A43 n.7.

and the court of appeals evidently concluded that Section 2518(4)(c) was likewise "intended to play a central role in the statutory scheme."[2] United States v. Giordano, 416 U.S. 505, 528 (1974). A7-A8. By all previous caselaw, suppression was thus proper here.

Nonetheless, relying on Fourth Amendment jurisprudence--in which the court of appeals had once deemed it permissible to look outside the four corners of an ordinary search warrant for particularity[3]--it rewrote that portion of Title III requiring suppression where an order is "insufficient on its face." 18 U.S.C. § 2518(10)(a)(ii). The statute does not mean what it says, the decision holds; instead, it means that an order "insufficient on its face" with respect to particularity can be made sufficient with extrinsic evidence.

No other court of appeals has ever held that a facial deficiency in a Title III order which violates central particularity provisions can be cured by extrinsic evidence. Contrast, United States v. Moore, 41 F.3d 370, 374-376 (8th Cir. 1994) (absence of judge's signature on Title III order was mere "technical defect" since central provision of the statute requires judicial approval, which was given, and does not require a signed order); United States v. Traitz, 871 F.2d 368, 379 (3rd Cir.), cert. denied, 493 U.S. 821 (1989) (failure to identify Justice official who authorized application, Chavez[4]-type defect); United States v. Swann, 526 F.2d 147, 149 (9th Cir. 1975) (Chavez-type defect); United States v. Joseph, 519 F.2d 1068, 1070 (5th Cir. 1975), cert. denied, 424 U.S. 909 (1976) (same); United States v. Vigi, 515 F.2d 290, 293 (6th Cir.), cert. denied, 423 U.S. 912 (1975) (same);

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[2]This is indisputably correct. Cf. S. Rep. No. 1097, 90th Cong., 2d Sess., 1968 U.S.C.C.A.N. 2153, 2191 (analogous provisions of § 2518(3) "are intended to meet the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity").

[3]United States v. Bonner, 808 F.2d 864 (1st Cir. 1986)

[4]United States v. Chavez, 416 U.S. 562 (1974) (wiretap application misidentified authorizing Justice official suffered from mere "technical defect" and did not violate "central provision").

United States v. Acon, 513 F.2d 513, 517-519 (3d Cir. 1975) (same)

The court of appeals' decision rested on the legally mistaken belief that "violations of even . . . central requirements [of Title III] do not mandate suppression if the government demonstrates to the court's satisfaction that the statutory purpose has been achieved despite the violation." A8-A9, quoting United States v. Johnson, 696 F.2d 115, 121 (D.C. Cir. 1982).

This is a novel and legally unsupported statement of Title III law.

The language from Johnson is dictum: Johnson concerned electronic surveillance authorized under the District of Columbia Code, not Title III. 696 F.2d at 116-117. The statutes contain significant differences. Id. at 122 n.45.

Not another federal court in the country has ever suggested, even in dictum, that there are circumstances under which "violations of even. . . central requirements [of Title III] do not mandate suppression." All this court's jurisprudence is to the contrary. United States v. Donovan, 429 U.S. 413, 433 n.22 (1977); United States v. Giordano, 416 U.S. 505, 524-528 (1974).

On this basis alone, certiorari is appropriate.

b. Based on a single, inapposite Fourth Amendment case, the court of appeals mistakenly concluded that a facially defective Title III warrant may be saved by extrinsic evidence of the knowledge of the issuing judge and executing officer.

Based on United States v. Bonner, 808 F.2d 864 (1st Cir. 1986), the court of appeals held that a Title III order lacking the requisite statutory particularity does not require suppression if extrinsic evidence shows that the judge and the executing officer both knew the true intent of the order. While purporting not to reach the issue, A8-A11, the court of appeals thus injected a new, hybrid "good faith" exception into Title III's exclusionary rules.

The court misapprehended the law in several respects.

First, the court's importation of Fourth Amendment law into Title III goes beyond any ordinary "good faith" exception to the statute's exclusionary rules. As the district court properly held, even if a

Fourth Amendment "good faith" exception were incorporated into Title III, it would not apply here since "no officer reading the facially defective warrant could have reasonably presumed it to be valid." A51; United States v. Leon, 468 U.S. 897 (1984); Massachusetts v. Sheppard, 468 U.S. 981, 988 (1984).

Second, Bonner's judge-made Fourth Amendment law is inapposite to Title III's exclusionary rules. Assuming arguendo that the Fourth Amendment permits a reviewing court to look outside the four corners of a search warrant for particularity as to the place to be searched, this is not germane to the proper inquiry: Congress' intent in drafting Title III's exclusionary rules. This court has repeatedly held:

> [T]he availability of the suppression remedies for these statutory, as opposed to constitutional violations . . . turns on the **provisions of Title III rather than the judicially fashioned exclusionary rule** aimed at deterring violations of Fourth Amendment rights. United States v. Donovan, 429 U.S. 413, 433 n.22 (1977), emphasis added; accord, United States v. Chavez, 416 U.S. 562, 574-575 (1974); United States v. Giordano, 416 U.S. 505, 524-529 (1974).

Because Title III's exclusionary rules include no good faith exception, this same court of appeals has "refus[ed] to apply a good-faith exception to allow . . . illegally-obtained evidence [under Title III] to be used at trial." United States v. Curzi, 867 F.2d 36, 44-45 n.8 (1st Cir. 1989). The First Circuit has also refused to incorporate into Title III's exclusionary rules the "innocent recipient" exception derived from Fourth Amendment law and set forth in United States v. Jacobsen, 466 U.S. 109, 113-118 (1984). United States v. Vest, 813 F.2d 477, 481-482 (1st Cir. 1987).

Other courts of appeals are in conflict on whether Fourth Amendment jurisprudence can be grafted onto Title III's statutory exclusionary rules.

In United States v. Bianco, 998 F.2d 1112 (2nd Cir. 1993), cert. denied, 511 U.S. 1069 (1994), the Second Circuit affirmed the lower court's incorporation of the good faith prong of the Franks test into

Title III's exclusionary rules. Id. at 1127-28, affirming a Connecticut district court's adoption of United States v. Ferrara, 771 F. Supp. 1266, 1304-05 (D. Mass. 1991). A judge in the Southern District of New York has now extrapolated from Bianco that "even in light of the statute's exclusionary rule, the good faith exception to the probable cause requirement, as set forth in Leon, should also apply to wiretap warrants." United States v. Ambrosio, 889 F. Supp. 177, 188 (S.D.N.Y. 1995).[5]

On the other hand, a different panel of the same court refused to incorporate the Fourth Amendment good faith exception announced in United States v. Leon, 468 U.S. 897 (1984) into a state wiretap statute, after careful statutory construction. United States v. Spadaccino, 800 F.2d 292, 296 (2nd Cir. 1986).

A panel of the Sixth Circuit split on another Fourth Amendment-Title III question. United States v. Baranek, 903 F.2d 1068, 1071-1072 (6th Cir. 1990) (incorporating good faith "plain hearing" exception into Title III's exclusionary rules, based on Coolidge v. New Hampshire, 403 U.S. 443 (1971)); and Id. 1072-1073 (Jones, J., dissenting) (urging strict construction of Title III's exclusionary rules).

The commentators, too, sharply disagree on whether Title III's exclusionary rules include a Fourth Amendment-derived good faith exception. Clifford S. Fishman, Wiretapping and Eavesdropping §

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[5] In Bianco the Second Circuit did not squarely address the applicability of Leon to Title III's exclusionary rules. The District Court below had found Leon applicable. 771 F. Supp. at 1297-98.

Other District Courts have disagreed, finding no good faith exception in Title III. United States v. Ward, 808 F. Supp. 803, 807-808 (S.D. Ga. 1992); United States v. McGuinness, 764 F. Supp. 888, 897 n.2 (S.D.N.Y. 1991); United States v. Orozco, 630 F. Supp. 1418, 1521-22 (S.D. Cal. 1986); City of Oakland by Kuhn v. City of Detroit, 610 F. Supp. 364, 369, n.10 (D. Mich. 1984).

A number of state courts have also refused to apply Fourth Amendment good faith exceptions to state statutory exclusionary rules. State v. Neisler, 655 So. 2d 252, 267-270) (La. 1995); State v. Garcia, 547 So.2d 628, 629 (Fla. 1989); Chan v. State, 552 A.2nd 1351, 1360 (Md. App. 1989) (dictum). See also, Id. at 1358 (dictum: Title III's exclusionary rule "invulnerable to good faith exception").

22:5(a) (1996) (Leon "good faith" exception to probable cause requirement inapplicable to Title III); James G. Carr, The Law of Electronic Surveillance, § 6.3A (1996 Supp.) (Leon applicable to Title III).[6]

Bonner is also factually inapposite. There, although the street address of the place to be searched was omitted from the warrant, the premises were nonetheless sufficiently described so that police were left with no unconstitutional discretion about where they might search.

Here, similarly, the balance of the order left no doubt about **where** the interception was to take place.[7] Instead, it lacked particularity as to what was to be intercepted or seized: wire or oral communications.

Even under Fourth Amendment jurisprudence, where, as here, a warrant lacks particularity as to what may be seized, a reviewing court may not consider an unincorporated, unattached affidavit, nor is the executing officer's subjective knowledge or belief relevant. United States v. Roche, 614 F.2d 6, 8 (1st Cir. 1980); United States v. Abrams, 615 F.2d 541, 544 (1st Cir. 1980); 2 LaFave, Search and Seizure, 559-560 (1996).

The necessary inquiry here, which the First Circuit failed to conduct, was to determine Congressional intent. There is no evidence that Congress ever intended any expansion of Fourth Amendment

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[6]Judge Carr's analysis of the 1986 amendments to Title III, from which he concludes that Congress grafted a broad good faith exception onto Title III's exclusionary rules, is based on an inattentive reading of the amendments. His argument, based on the addition of § 2518(10)(c), fails to reckon with the fact that this section concerns only "electronic communications," which are distinct from "oral communications" and "wire communications" under Title III, 18 U.S.C. § 2510 (1), (2) and (12); and that Congress expressly did not amend Title III's main exclusionary rules, §§ 2515, 2518(10)(a), to include "electronic communications." Congress obviously intended that "electronic communications" be treated with less caution than oral and wire communications. See Fishman, supra, §§ 22.4, 22.5(a).

[7]The Order authorized interception to occur within "Dillons Tavern' which is located within a concrete type structure located at 11 Tapley Street in the City of Springfield at the corner of Tapley Street and St. James Avenue. . . ." A4-A5.

jurisprudence into Title III's exclusionary rules and substantial evidence to the contrary.

In 1968, Congress stated its intent that its statutory exclusionary rule would "reflect existing law." Senate Report (Judiciary Committee) No. 1097 at 96, 1968 U.S. Code Cong. & Admin. News 2112, 2185; United States v. Giordano, 416 U.S. 505, 528-529 and n.17 (1974). It would thus be surprising if Congress intended a retroactive reading of an unusual (and factually inapposite) Fourth Amendment case--United States v. Bonner, 808 F.2d 864 (1st Cir. 1986)--into this provision .

Further, in 1986--after both Leon and Franks narrowed the Fourth Amendment exclusionary rule--Congress amended 18 U.S.C. § 2520(d) of Title III[8] and expressly provided for a good faith defense "against any civil or criminal action brought under this chapter or any other law." 18 U.S.C. § 2520(d). By contrast, it did not enact any new good faith exception to Title III's exclusionary rules, 18 U.S.C. §§ 2515, 2518(10)(a). Sutherland Statutory Construction, § 47.23 (5th ed. 1992).

The line separating the statutory exclusionary rules controlled by Congress from the judicially-crafted Fourth Amendment exclusionary rule is a paradigm for the core principle of separation of powers and must remain inviolate.

Certiorari is thus necessary to preserve the separate integrity of the courts and Congress and to foster a unified system of law throughout the federal courts on an important federal question.

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[8]P.L. 99-508, Title I, § 103, 100 Stat. 1854 (1986).

II. In reversing the district court on legally novel grounds not raised below, the court of appeals acted outside the scope of its "plain error" jurisdiction as circumscribed in United States v. Olano, 507 U.S. 725 (1993).

As the court of appeals acknowledged, the government never argued below--before the magistrate judge or the district court judge--that the order could be saved by extrinsic evidence of the judge's or executing officer's knowledge; on the contrary, the government had pushed hard for an analysis limited to the order's "four corners." A5-A6.

Until this case, the court of appeals had consistently held that the failure to comply with Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts "precludes review" in the court of appeals. United States v. Mitchell, 85 F.3d 800, 803 (1st Cir. 1996); Keating v. Sec. of Health and Human Services, 848 F.2d 271, 275 (1st Cir. 1988); Borden v. Sec. of Health and Human Services, 836 F.2d 4, 6 (1st Cir. 1987); United States v. Vega, 678 F.2d 376, 379 (1st Cir. 1982).

By the present decision, the court decided that an issue defaulted under Rule 3(b) may be considered under the "plain error" standard of Fed. R. Crim. P. 52(b).[9] A7. Thomas v. Arn, 474 U.S. 140, 155 and n.15 (1985).

In ruling that a facially defective Title III order, violating central provisions of the statute, may be cured by extrinsic evidence, the court of appeals misapplied this standard of review. An error is only "plain" if it is "obvious" and "clear under current law." United States v. Olano, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed.2d 508, 518-519 (1993).

As shown in the first section of this petition, the panel's view of Title III law is hardly "obvious." Its belief that violations of central provisions of Title III do not always require suppression is based on dictum in a single case from another circuit and is contrary to this

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[9]Rule 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

court's--and all other circuit courts'--jurisprudence. Its belief that the knowledge of the judge and executing officer can save a defective Title III warrant from suppression is based on a single Fourth Amendment case from the First Circuit, which has refused in other cases to import Fourth Amendment law into Title III's exclusionary rules. The court itself acknowledged that the "Bonner argument is not intuitively evident." A7.

We are aware of no other decision, from any court of appeals, which interprets Olano to allow creative law-making in this manner. United States v. Jones, 108 F.3d 668,671, 1997 U.S. App. LEXIS 4617, 8-9 (6th Cir.) (plain error inapplicable where caselaw is "sparse," "divergent and conflicting"); United States v. Alli-Balogun, 72 F.3d 9, 12 (2nd Cir. 1995) (plain error inapplicable "when the Supreme Court and this court have not spoken on the subject, and the authority in other circuit courts is split"), followed in United States v. Thompson, 82 F.3d 849, 854-856 (9th Cir. 1996) (plain error inapplicable "[b]ecause of the circuit split, the lack of controlling authority, and the fact that there is at least some room for doubt about the outcome of this issue"); United States v. Baumgartner, 85 F.3d 1305, 1308 (8th Cir. 1996) and United States v. Webster, 84 F.3d 1056, 1066-1067 (8th Cir. 1996) (plain error applicable where law made "clear" by U.S. Supreme Court after trial).

Because the court of appeals lacked jurisdiction to reverse the district court, certiorari is urgently needed.

III. A state prosecutor's ignorance-of-federal-law excuse is not an "objectively reasonable" explanation for a seven-day sealing delay under United States v. Ojeda Rios, 495 U.S. 257 (1990).

On April 8, 1992, seven days after the final order terminated, the original tape recordings were delivered to the judge and sealed.

The state prosecutor testified that the sole reason he waited seven days was because the Massachusetts electronic surveillance statute did not require sealing and allowed him "a minimum of seven days, probably more" to make his return. At the time, he testified, he was "not familiar with Title III;" had "never read the federal statute" nor

tried to find out what the federal sealing requirements were; and had "never heard of" the Supreme Court's decision on Title III's sealing requirements, United States v. Ojeda Rios, 495 U.S. 257 (1990).

The district court excused the delay here for the following reason, accepted by the court of appeals, A12-13:

> Trooper Alben acknowledged that the tapes could have been prepared and returned within a day or two. . . . However, the return was not made for seven days because of law enforcement personnel's belief that the law entitled them to a full seven days. . . [S]even days is the outside limit [for return under the Massachusetts statute], and the government was within this timeframe. . . Equally compelling is the fact that "in responding sluggishly to his. . . responsibilities vis-a-vis presentation of the evidence for judicial sealing [the prosecutor] acted in ignorant bliss and negligently, but . . he was not consciously or deliberately failing to perform his duty, nor was he acting in bad faith. See [United States v.] Mora, 821 F.2d 860, 870 (1st Cir. 1987). . .The integrity of the tapes was unaffected; the tardiness neither benefitted the government nor disadvantaged the defendants; and there was no deliberate flouting of the law. See Id.; cf. United States v. Gigante, 538 F.2d 502, 504-507 (2nd Cir. 1976). A35-A36.

The district court and the panel thus relied on legal standards which are no longer applicable.

This court has now ruled, "To hold that proof of nontampering is a substitute for a satisfactory explanation is foreclosed by the plain words of the sealing provision." Ojeda Rios, supra, at 264-265.

Further, the prosecutor's "ignorant bliss"--i.e., his subjective good faith--was also legally beside the point: the legal issue was whether his excuse was "objectively reasonable at the time of the delays." Ojeda Rios, supra, at 266 (1990); 18 U.S.C. § 2518(8)(a).

In establishing a reasonable excuse for the delay, the government was "required to prove. . . that its interpretation [of the law] was objectively reasonable at the time." Id. at 266. The prosecutor's belief

that he had a grace period of seven days or more was just not "objectively reasonable" in April, 1992. It was then elementary that Title III governs state prosecutions. 18 U.S.C. § 2518(10)(a). State and federal caselaw had already warned prosecutors against reading the Massachusetts statute "as sanctioning a delay. . .if it is practicable that a return be made before expiration of the seven-day period." Commonwealth v. Vitello, 367 Mass. 224, 267, 327 N.E. 2d 819, 844 (1975); United States v. Mora, 821 F.2d 860, 863-867 (1st Cir. 1987). This court had left no room for doubt that Title III required prosecutors to seal wiretap materials "immediately" or risk suppression. Ojeda Rios, supra.

It is an affront to federal law to accept a state prosecutor's careless ignorance of Title III and Supreme Court jurisprudence--especially in the sensitive area of electronic surveillance--as an "objectively reasonable" basis for violating it.

Certiorari is thus appropriate on this point as well.

CONCLUSION

For each of the foregoing reasons, Petitioners pray that this Court grant their petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit reversing the allowance of their motion to suppress.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA, Appellant,

v.

REX W. CUNNINGHAM, et al, Defendants, Appellees.

No. 96-1828

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

1997 U.S. App. LEXIS 11632
113 F.3d 289
May 19, 1997, Decided

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Frank H. Freedman, Senior U.S. District Judge.

DISPOSITION: Reversed.

COUNSEL: Wendy Sibbison for appellees.

Todd E. Newhouse, Assistant United States Attorney, with whom Donald K. Stern, United States Attorney, was on brief for the United States.

JUDGES: Before Boudin, Circuit Judge, Bownes, Senior Circuit Judge, and Lynch,
Circuit Judge.

OPINION BY: BOUDIN

In the district court, the defendants in this criminal case moved to suppress evidence as illegally seized and, based on the magistrate judge's report, the district court granted the motion. The government filed an interlocutory appeal from the suppression order. We reverse.

I.

In late February 1992, Carmen Picknally, an assistant district attorney in Hampden County, Massachusetts, applied to the state Superior Court for a warrant, pursuant to Mass. Gen. Laws ch. 272, sec. 99(F), to authorize the interception of telephone calls to or from two specified cellular car telephone numbers. The car telephones in question were located in cars controlled by defendant Rex W. Cunningham, Jr., and the offenses under investigation were suspected violations of state anti-gambling statutes. Mass. Gen. Laws ch. 271, sec. 17.

A supporting 109-page affidavit by state trooper Timothy Alben described evidence that Cunningham had used threats in attempting to collect gambling debts for bets that he had taken. The affidavit also set forth information from five confidential informants about a large-scale gambling organization allegedly controlled by Cunningham, including specifics as to how the organization worked, the names of employees, telephone numbers, and the location of records and cash.

On February 28, 1992, Justice Constance Sweeney, of the state Superior Court, issued the requested warrant, and signed ancillary orders directed to two carriers. Several incriminating calls were intercepted between Cunningham and others and were described in another affidavit of Alben in support of a requested extension sought by Picknally on or about March 17, 1992. Justice Sweeney granted the requested extension. Surveillance of the two telephones ended on April 1, 1992. On April 17, 1992, Picknally applied to the Superior Court for a new warrant, this time (according to the application's caption) "authorizing the interception of oral communications of . . . Cunningham within an establishment known as Dillons (sic) Tavern." The application identified Dillon's Tavern at a street address in Springfield, Massachusetts, and said that it was on property controlled by Cunningham and his relatives. Incorporating a

new Alben affidavit, the application referred to loansharking, Mass. Gen. Laws ch. 271, sec. 49, as well as gambling, as suspected offenses. Although the caption referred to interception of oral communications "within . . . Dillons (sic) Tavern," the first paragraph described the application as one for a warrant "to intercept certain wire and oral communications," and there are later references to "wiretaps" and, separately, to "oral communications . . . within Dillons (sic) Tavern." The affidavit also asked for authority for Alben to make secret entries into Dillon's Tavern "for the purpose of installation and activation of oral interception devices." This application, it appears, was a poorly edited markup of the original wiretap application.

Immediately below Picknally's signature was a paragraph signed by the district attorney for the county, saying that he had reviewed the application and affidavit and that the proposed use of electronic surveillance relative to two specified telephone numbers was consistent with county policy. The two listed telephone numbers were the cellular telephone numbers specified in the original application. Apparently the paragraph had been copied from the original warrant application without change.

The supporting Alben affidavit, this time 62 pages in length but attaching the original affidavit as well, described Cunningham's caution in using the telephone and provided reasons for believing that Cunningham and others were using Dillon's Tavern for meetings in aid of gambling and loansharking. The affidavit described Cunningham's regular use of a particular table in Dillon's Tavern to conduct his business. It also explained why oral interceptions were needed to supplement other evidence.

Alben's affidavit did not contain the confusing jumble of references to wiretaps and oral communications that marred the Picknally application. It asked for approval to intercept oral communications within Dillon's Tavern, specifying that interception would be limited to only such times that physical surveillances of this DILLONS TAVERN and Rex W. CUNNINGHAM Jr. can reasonable (sic) place CUNNINGHAM within this location and that interceptions will take place only at or near the particular table within the dining area which has been identified within this affidavit as being

consistently used by CUNNINGHAM or his associates.

It also asked approval to enter Dillon's Tavern to install technical equipment to achieve the interceptions.

The warrant signed by Justice Sweeney had a caption similar to the application, specifically referring to interception of oral communications; but--like the application--the warrant also referred confusingly to wire communications. It approved the secret entry to install equipment, and imposed various safeguards. The warrant was extended numerous times, and assault and battery was added as a suspected offense. Surveillance ended on November 1, 1992. By then 125 cassette tapes had been accumulated and were sealed by the Superior Court.

On April 21, 1995, a federal grand jury in Springfield indicted Cunningham on RICO violations, loansharking, illegal gambling activities, and conspiracy to commit those offenses, 18 U.S.C. secs. 2, 892, 894, 1955, and 1962 (c)and(d). Co-defendants Brian Hoyle and Thomas Ferris were charged with loansharking conspiracy. Most of the evidence against Cunningham, and all of the evidence against the co-defendants, derived from the electronic surveillance and from searches conducted under state-court issued warrants at various sites shortly before the surveillance terminated.

By joint motion filed on December 15, 1995, the defendants moved to suppress materials acquired by electronic surveillance under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. secs. 2510-20. That statute governs interception of both wire communication and oral communication, laying down detailed standards and procedures. Id. secs. 2516-18. It also provides for exclusion from evidence of interceptions taken in violation of the statute. Id. sec. 2515. After a two-day evidentiary hearing, including testimony from Picknally, Alben, and Hampden County District Attorney William Bennett, the magistrate judge issued a report on March 28, 1996. In it, he recommended that the motion to suppress be allowed as to all electronic interceptions of conversations at Dillon's Tavern. He said that the confusion in the warrant meant that it did not comply with statutory requirements as to specificity, 18 U.S.C. sec. 2518(4), nor--assuming a good faith exception existed--was reliance

on the warrant objectively reasonable.

On May 17, 1996, the district court approved the magistrate judge's recommendation. Its analysis tracked that of the magistrate judge and his rejection of a "good faith" defense was adopted by cross reference. In memoranda dated June 13 and July 12, 1996, the district court addressed two successive government motions for reconsideration but stood by its earlier conclusion. The government then brought the case to us by interlocutory appeal. 18 U.S.C. sec. 3731.

II.

On review of a suppression order, we defer to the factfinder's findings of raw fact unless clearly erroneous, and we consider issues of law de novo. United States v. Morris, 977 F.2d 677, 680 (1st Cir. 1992). In the past, there has been deference accorded to the factfinder's judgment in applying general standards to particular known facts; but the Supreme Court has recently stressed our responsibility, in a related Fourth Amendment context, to review "mixed questions" from an independent vantage. Ornelas v. United States, 134 L. Ed. 2d 911, 116 S. Ct. 1657, 1663 (1996) (reasonable suspicion and probable cause).

The government offers two alternative reasons for reversal. The first is its claim that the warrant adequately, although not perfectly, identified oral communications as its target--especially since Justice Sweeney and Trooper Alben as executing officer knew that this was its purpose. The second argument is that the so-called good-faith exception of United States v. Leon, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984), is available under the statute in this case and applies on the present facts.

At the threshold, defendants object that neither basis for appeal was sufficiently preserved. Because we consider only the first ground on the merits, our discussion of this threshold objection is similarly limited. To decipher that objection, it is necessary to understand how the government's defense of its warrant evolved on the path from the magistrate judge to the district court and finally to us.

Before the magistrate judge, the government defended its warrant on the ground that, analyzing the wording in detail, the errors were technical or clerical. The government did not expressly assert that the

personal knowledge of the authorizing judge and executing officer were pertinent; but, the magistrate judge touched obliquely on the issue, saying that the government's "excuse" would, if accepted, "allow agents to conduct searches so long as they understood what was intended by the orders which their attorneys drafted for signatures by the court."

In its district court brief, the government again analyzed the warrant's language, arguing that it referred several times to interception of oral communications at Dillon's Tavern and that no reasonable officer would read it to approve wiretaps, especially because no telephone numbers were listed in the warrant. The government did not mention the knowledge of the judge or executing officer: indeed, in its first petition for reconsideration, the government complained that the district court had looked "beyond the four corners of the warrant."

The government's first attempt to emphasize what Justice Sweeney and Trooper Alben knew at the time came only in its appellate brief where, for the first time, it also cited to United States v. Bonner, 808 F.2d 864 (1st Cir. 1986), and similar cases making such knowledge relevant. Whether this new emphasis is a separate "ground" or merely a new twist, the government clearly did not offer it below and instead steered the magistrate judge and district court toward a strict linguistic analysis of the warrant. If these judges erred, it was surely error "invited" by counsel.

But whether we should ignore Bonner is a more difficult question. The government sought timely review of the magistrate judge's ruling, and it filed a timely appeal to us from the district court's ruling. True, local rules warn that failing to list grounds for reviewing the magistrate judge's report may be fatal;[1] but we do not read this warning to counsel as preventing a reviewing court--where timely

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1 Compare Rule 3(b), Rules for U.S. Magistrates in U.S. District Court in Massachusetts with Thomas v. Arn, 474 U.S. 140, 146 & n.4, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985) (declining to treat such rules as jurisdictional). See generally 15A C. Wright, et al., Federal Practice and Procedure sec. 3901.1, at 42 (2d ed. 1992).

review is sought at each stage--from noticing on its own arguments not developed below.

The ability of a reviewing court to decide the case properly is fundamental. Singleton v. Wulff, 428 U.S. 106, 120-21, 96 S. Ct. 2868,49 L. Ed. 2d 826 (1976). Indeed, the rules expressly preserve our ability to notice "plain errors" that affect "substantial rights," Fed. R. Crim. P. 52(b), especially where failure to do so would work a substantial injustice. United States v. Olano, 507 U.S. 725, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993); see also Johnson v. United States, S. Ct., 1997 WL 235136 (U.S. May 12, 1997). The threat of substantial injustice is not limited to the interests of defendants. United States v. Krynicki, 689 F.2d 289, 292 (1st Cir. 1982).

In this case, Bonner and similar decisions show that the issue of knowledge is not wholly distinct from the claim of clerical error; whether an error is forgiven as clerical depends, at least in some situations, on whether in context it actually threatened privacy interests; and this in turn may be affected by the executing officers' knowledge. The Bonner argument is not intuitively evident; but it is "plain" enough once the cases are consulted.

A final reason for refusing to cabin the analysis here is that the defendants are not prejudiced, because their ability to meet the government's Bonner argument is not affected by the delay. The knowledge of the state judge and executing officer is readily inferred from documents and from testimony taken at the magistrate judge hearing, where defense counsel cross-examined the witnesses. Defendants have not pointed to any evidence lost or foregone due to the government's tardiness in making its knowledge argument.

III.

Turning then to the merits, we face at the outset a statutory ban on use in court of the contents of an intercepted wire or oral communication, or "evidence derived therefrom," where disclosure would violate Title III. 18 U.S.C. sec. 2515. There is no violation if the interception was "authorized by" Title III. Id. sec. 2517. The authorizing provisions, 18 U.S.C. secs. 2516-18, elaborately set forth the crimes to be investigated, the application process for authorizing orders, and the standards to be met.

Pertinent here is 18 U.S.C. sec. 2518(4), which governs each order authorizing an interception and requires that the order specify five different items. Three items (subsections (a), (d) and (e)) are not in dispute: the identity of the target, the identity of the agency and the authorizing official, and the time period. The other two items which must be included are as follows: (b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted; [and] (c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates[.]

The defendants invoked both provisions; the magistrate judge and the district judge focused upon (b), as the government seeks to do here. In truth, we think that both provisions need to be read together. Their thrust, disregarding the final clause of (c), is to identify the type of communication and to narrow the targeted communications by location of "facilities" (e.g., identifying a particular telephone) or "place" (e.g., where a "bug" is to be located to intercept oral communications).

In a literal sense, the warrant does describe both type and place: it refers expressly to oral communications and to Dillon's Tavern. But this is an extreme example of missing the forest for the trees. By referring randomly to oral communications and wire communications or wiretaps, the warrant is garbled on the very questions posed by subsections (b) and (c). Taken as a whole--but taken alone and without extrinsic evidence--the warrant does not tell the objective but ignorant reader just what interceptions are to be targeted.

Now, the extent of confusion is a matter of degree. Any reader can see that the warrant has been misdrafted; whether a reasonable (but otherwise uninformed) police officer would solve the puzzle correctly is probably a matter of percentages. In all events, the confusion is serious, and despite the government's linguistic acrobatics, this is not a warrant that we would deem adequate if it were signed by a judge and executed by a police officer having no other knowledge of the background and objectives.

The inadequacy is not because of any high likelihood that an otherwise uninformed officer would tap a telephone or would intercept Cunningham's oral communications at some other location than

Dillon's. No telephone number is given in the body of the warrant, and no other "place" of interception is mentioned. Rather, standing alone, the bare inconsistent words of the warrant fail to create reasonable assurance that the signer or reader would know just what was intended.

But this is not the end of the story. The Supreme Court has made clear that suppression is not automatically required for every Title III violation; rather, as a sister circuit summed up the Supreme Court's precedents in United States v. Johnson, 225 U.S. App. D.C. 33, 696 F.2d 115, 121 (D.C. Cir. 1982), "violations of even . . . central requirements do not mandate suppression if the government demonstrates to the court's satisfaction that the statutory purpose has been achieved despite the violation. See also United States v. Donovan, 429 U.S. 413, 433-34, 50 L. Ed. 2d 652, 97 S. Ct. 658 (1977); United States v. Chavez, 416 U.S. 562, 574-75, 40 L. Ed. 2d 380, 94 S. Ct. 1849 (1974).

Title III is designed to protect privacy interests similar to those reflected in the Fourth Amendment. Whether or not Leon's good faith exception should be interpolated into the statute--an issue we do not decide--Fourth Amendment precedent is highly relevant in deciding whether an authorizing order is valid and whether a defect in wording is of a kind that threatens the central interests sought to be protected. Indeed, the Supreme Court itself has relied upon Fourth Amendment precedent in implementing Title III. Dalia v. United States, 441 U.S. 238, 254-59, 60 L. Ed. 2d 177, 99 S. Ct. 1682 (1979).

A substantial body of Fourth Amendment precedent akin to Bonner, representing most circuits, permits a reviewing court to consider the knowledge of the officials who approved the warrant and executed it. The reason is fairly straightforward: such knowledge may, on particular facts, show that there was in fact no real threat to legitimate privacy interests. Examples include the judge approving the warrant but forgetting to sign, or the warrant's omission of an address

known both to the judge and executing officer.[2]

In calling such mistakes "clerical," courts do not mean that they are all unimportant typographical errors. What is meant is that they are wording mistakes introduced by accident or lack of care rather than wilfully or with a sinister purpose. Cases like Bonner often involve, and forgive, very serious clerical mistakes, depending upon the risk that they posed in fact. E.g., Bentley, 825 F.2d at 1109 (personal knowledge of officers saved warrant that listed wrong office number). In this sense, the term "clerical" is highly misleading.

Such an approach is not cost free. In an individual case, a defect may pose no threat (we will show that this is so here); but exclusion of evidence in that case will still make the police more careful next time and so may prevent a different mistake that does pose such a threat. But there are costs either way: excluding reliable evidence and possibly freeing the guilty is also a cost. And cases like Bonner represent a balance between competing objectives. In any event, such is the law of this circuit and many others. In sustaining the warrant in this case. we rely upon two major elements. First, the flaw in this case, although serious, was a discrete set of clerical mistakes in a process that in all other important respects complied with the statute. An application to a judge was made; it demonstrated probable cause and other requisites for the interceptions proposed; it identified place and type (although in a confusing language); a warrant was signed; and the authorizing judge and executing officer knew just what they were doing. Second, because the judge and the executing officer knew what had been proposed and authorized, there was no substantial threat that this officer would intercept communications other than as authorized. Thus, despite the seriously confusing

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2 See, e.g., United States v. Brown, 49 F.3d 1162, 1168-69 (6th Cir.), cert. denied, 133 L. Ed. 2d 301, 116 S. Ct. 377 (1995); United States v. Owens, 848 F.2d 462, 465 (4th Cir. 1988); United States v. Bentley, 825 F.2d 1104, 1109 (7th Cir.), cert. denied, 484 U.S. 901, 98 L. Ed. 2d 198, 108 S. Ct. 240 (1987); United States v. Turner, 770 F.2d 1508, 1511 (9th Cir. 1985). An extensive collection of federal cases, by circuit, is contained in 84 Geo. L.J. 717, 734 n.78 (1996). Some additional case authority, including state cases, is contained in 2 LaFave, Search and Seizure sec. 4.5(a) (3d ed. 1996).

language, the error here presented far less of a threat to civil liberties than, say, a facially coherent warrant that mistakenly inverted the numbers of a street address and was executed by an officer who did not know the actual address.

It is the combination of these two elements that, as in Bonner, persuades us that the warrant should be treated as valid and, as in Johnson, that "the statutory purpose [of Title III] has been achieved despite the violation." 696 F.2d at 121. And, as always, substantial compliance and risk from error are matters of degree. Knowledge would not save the interception if, for example, Alben had made out the affidavit but then neglected to present it to a judge to secure judicial approval. Similarly, nothing in what we say offers any comfort to an officer who fails to comply with the true object of the warrant.

It is also worth stressing that the knowledge of Justice Sweeney and of Trooper Alben are established by a paper-trail record that was created before the search. The affidavits submitted to secure the telephone taps and then to authorize oral interceptions show beyond serious dispute just what the judge and the executing officer understood. The hearing record before the magistrate judge does help knit the events together, but there is no threat here of recollections being invented after the event.

This hard evidence lessens, although it does not eliminate, the problems associated with any resort to personal knowledge. But proof of the knowledge possessed by the police is the critical issue for most warrantless arrests and searches, e.g., Chambers v. Maroney, 399 U.S. 42, 47-48, 26 L. Ed. 2d 419, 90 S. Ct. 1975 (1970); and, of course, knowledge is scrutinized in warrant cases as well where (for example) there is a charge of fabrication or of invented information.

The Supreme Court's cases do express a special concern where subjective motivation rather than knowledge is involved. Thus, the Court has held as a matter of law that malignant motive is irrelevant where objectively reasonable conduct is proved to make out a defense of governmental qualified immunity, Anderson v. Creighton, 483 U.S. 635, 641, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987), or where probable cause exists but a search is challenged as pretext. Whren v.

United States, 135 L. Ed. 2d 89, 116 S. Ct. 1769, 1774 (1996). But the special concerns about overturning reasonable conduct because of bad motive have nothing to do with this case.

One final word on this issue is in order. Where, as here, the government seeks to rescue a defective warrant based partly on knowledge of the judge or officer, the burden is upon it to prove such knowledge--just as it would be the defendant's burden if the warrant were facially valid but sought to be impugned by proof of perjury. It is fortunate for the government that in this case, the evidence is overwhelming and available from the existing record. This piece of luck does not make the mishandling of the matter look any more attractive.

IV.

The defendants advance an alternative ground for upholding the suppression of the Dillon's Tavern tapes. They claim that the government failed to comply with the sealing requirement of Title III, 18 U.S.C. sec. 2518(8)(a), with respect to the cellular phone tapes. And, since the Dillon's Tavern surveillance derived from this allegedly tainted evidence, defendants say that it must be suppressed. Id. sec. 2515. The district court ruled that the brief delay in sealing was not material.

The statute authorizing an interlocutory appeal from an order of suppression, 18 U.S.C. sec. 3731, gives only the government a right to appeal, and for good reason. If evidence is suppressed, the government cannot appeal the suppression order after trial for double jeopardy reasons, whereas the defendant(if convicted) can always appeal from the district court's earlier refusal to suppress.

It is well-established that appellate courts can uphold a judgment based on a ground rejected by the district court. This general principle has been applied to section 3731 appeals. United States v. Moody, 485 F.2d 531, 534 (3d Cir. 1973). But the government objects in this case that the defendants' alternative ground would not only support the order suppressing the Dillon's Tavern tapes but also undermine the different order declining to suppress the cellular phone tapes. Thus, it argues that the alternative ground is really a Trojan-horse effort to review an unappealable order.

The argument is clever but unpersuasive. The fact that the sealing issue may have implications for two different orders does not prevent us from considering that issue so far as it pertains to a reviewable order. The cases cited by the government, e.g., United States v. Shameizadeh, 41 F.3d 266, 267 (6th Cir. 1994), are not on point. Indeed, if we thought that the suppression order were clearly valid, but on a ground different than that offered by the district court, it would be bizarre to overturn it.

In this instance, however, the magistrate judge and the district court amply justified their action in treating the brief sealing delay as "satisfactorily explained." 18 U.S.C. sec. 2518(8)(a). See United States v. Ojeda Rios, 495 U.S. 257, 265, 109 L. Ed. 2d 224, 110 S. Ct. 1845 (1990). There was no bad faith by the police, no claim of alteration to the tapes, and no other prejudice even suggested. Given these circumstances and the brevity of the delay, we think no extended discussion is required in this case.

Reversed.

APPENDIX B

UNITED STATES OF AMERICA, Appellant,

v.

REX W. CUNNINGHAM, et al, Defendants, Appellees.

No. 96-1828

Before

Torruella, Chief Judge

Bownes, Selya, Boudin, Stahl and Lynch, Circuit Judges

ORDER OF THE COURT

Entered: June 4, 1997

The panel of judges that rended [sic] the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court

WILLIAM N. NG, CLERK

By Janice M. O'Neil
Chief Deputy Clerk

[cc. Messrs. Sibbison, Silver, St. Clair, Chaitowitz, Stern and Newhouse]

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)Crim No.
v.	)95-30009-FHF
	)
REX W. CUNNINGHAM, JR.,	)
BRIAN HOYLE, and	)
THOMAS FERRIS,	)
Defendants	)

MEMORANDUM AND ORDER
May 17, 1996

FREEDMAN, S.J.

I. INTRODUCTION

Defendants Rex Cunningham, Brian Hoyle, and Thomas Ferris ("defendants") filed a joint motion to suppress wire and oral communications intercepted by electronic surveillance. Magistrate Judge Kenneth P. Neiman ("Magistrate Judge") issued a report and recommendation that the Court grant the motion to suppress in part and deny it in part. See Report and Recommendation With Regard to Defendants' Joint Motion to Suppress Wire and Oral Communications Intercepted by Electronic Surveillance (D. Mass. March 28, 1996) (Neiman, U.S.M.J.) ("Report and Recommendation"). Defendants and the United States of America ("the government") object to various portions of the Report and Recommendation.

II. FACTUAL AND PROCEDURAL HISTORY

The parties do not contest the Magistrate Judge's summation of the factual background of the case. As a result, the Court will adopt that summation for purposes of this Memorandum and Order. Cf. 28 U.S.C. § 636(b)(1) (district court judge reviews de novo those sections of a magistrate judge's report and recommendation to which a party has specifically objected):

A hearing on Defendants' motion was held over the course of three days, two of which entailed the presentation of witnesses. The Government and Defendants, through counsel, stipulated to the following documentary evidence: (I) exhibits submitted by Defendants in three volumes . . . (hereinafter
"Vol. __, at __"); (ii) four affidavit exhibits attached to the Government's memorandum in opposition to the motion to suppress . . . ; (iii) the Government's affidavit of Trooper Timothy P. Alben, together with exhibits attached thereto . . . ; and, (iv) four exhibits introduced by Defendants during the course of the hearing . . . .

A. Cellular Telephone Intercepts

On February 28, 1992, upon application of Carmen Picknally, specially designated Assistant District Attorney of the Hampden District ("A.D.A. Picknally"), Associate Justice Constance M. Sweeney, of the Superior Court Department of the Trial Court of Massachusetts, issued a warrant, pursuant to Massachusetts General Laws c. 272, [section] 99(F), authorizing the interception of wire communications over cellular telephones number (413) 531-4994 and (413) 531-3188, located within motor vehicles in the possession of or under the control of Defendant Rex W. Cunningham, Jr. ("Cunningham"), with regard to violations of [Massachusetts General Laws c. 271, section 17], illegal gaming. Vol. III, at 649. Related orders were issued to Metromobile Cellular Telephone Service and New England Telephone. Vol. III, at 649B-649C. A.D.A. Picknally's application, Vol. III, at 650, was supported by the affidavit of Massachusetts State Police Trooper Timothy P. Alben ("Trooper Alben"), Vol. III, at 666, et seq.

As part of his affidavit, Trooper Alben described the tale of a Springfield attorney, Steve Linial ("Linial"), who

apparently owed thousands of dollars in gambling losses to Cunningham, and how Cunningham used threats in an attempt to collect. Vol. III, at 688-89. Linial's own statement--which included details on how he placed bets with Cunningham and, later, with other persons, and on the methods Cunningham used to try to collect on the debt, Vol. III, at 666 and Attachment 1 thereto (starting after 774)--became part of the state's ongoing investigation into illegal gaming in Springfield. At the time Linial came forward, Cunningham had prior state gaming convictions. Vol. III, at 687-88.

Trooper Alben's affidavit described how, in 1991, police received information from five separate confidential informants about a large scale gaming organization allegedly controlled by Cunningham. Three of the informants provided details about the organi-zation and Cunningham, including how the organization worked, the names and addresses of various employees and their roles in the organization, telephone numbers over which bets could be placed, the location of gaming records, and two locations where Cunningham allegedly kept large amounts of cash. Vol. III, at 689-94, 695-703. The other two informants provided corroborating details about the scope and operation of the organization, including the location of an illegal card game, the connections between this game and organized crime and illegal sports betting. Vol. III, at 703-05.

Intelligence from these informants led to further investigations by the police, who discovered the corporate structure of Rexco, Inc., a corporation controlled by Cunningham, the name of the "contact" person for the corporation, Richard Stambovsky, the telephone records of two of Cunningham's alleged employees, Brian Collins and Robert LaFountain, documentary connections between these individuals and Cunningham and two more alleged

employees, Timothy Adams and Ronald Geagan, and addresses and telephone numbers showing associations among these individuals and Cunningham. Vol. III, at 707-15. Additionally, the informants confirmed that four persons arrested in 1991 for gaming offenses worked for Cunningham's organization. Vol. III, at 715-22 and Attachment 2 thereto, at 5. Further information was obtained through direct surveillance by police of a party and golf tournament allegedly organized by Cunningham in honor of Adolfo Bruno, a person described by [Trooper Alben] as having RICO and state gaming convictions. Vol. III, at 722-26.

Trooper Alben's affidavit also describes how investigating officers subpoenaed the records of two cellular telephones used by Cunningham. The records yielded hundreds of telephone numbers dialed between August, 1991, and January, 1992, together with a list of the most frequently dialed numbers. Some of the individuals subscribing to these numbers had gaming or RICO convictions, and some of the locations were associated with past gaming convictions and had been the subject of past search warrants. Vol. III, at 726-61.

On or about March 17, 1992, A.D.A. Picknally submitted an application, Vol. III, at 783-97, seeking an extension of the initial warrant, supported by another affidavit of Trooper Alben. Vol. III, at 798-817. In his affidavit, Alben asserted that the two cellular telephones had been monitored for thirteen days, fourteen hours a day, resulting in the interception of twenty-one complete calls. Of these, he asserted that three were "of an incriminating nature relating to the designated offense of illegal gaming or conspiracy to commit illegal gaming offenses." Vol. III, at 803.

The first "incriminating" call, intercepted on March 4, [1992], between Cunningham and a Brian Collins, was alleged to be "heavily cloaked in covert terms and hidden meanings," which Trooper Alben interpreted as follows:

> [I]t is my opinion that the above referenced telephone conversation . . . is focused around money that is owed to this organization by an individual who is referred to as "that kid" and "my friend." CUNNINGHAM is telling COLLINS that this individual should have half the money by tomorrow and the balance by Saturday and he explicitly tells COLLINS that if he doesn't meet this criteria that COLLINS "knows what to do." CUNNINGHAM further tells COLLINS that if there is difficulty to "just put him to the side." The conversation displays a supervisory/subordinate relationship between CUNNINGHAM AND COLLINS in that CUNNINGHAM is clearly giving COLLINS directions as to how to handle this matter.

Vol. III, at 805-06. The second call, intercepted on March 12, 1992, between Cunningham and a person identified as "Brian," was summarized by Trooper Alben as follows:

> Rex explains to Brian the details of some event this afternoon in which he, CUNNINGHAM, and others were attempting to (sic) invoke physical violence against a group of people at some unknown location. CUNNINGHAM explains that a traffic accident occurred nearly which [sic] resulted in the police appearing which allowed these persons to escape. . .
>
> .

Vol. III, at 807. The third intercepted call, on March 16, revealed that the alleged purpose of this foiled event was "to

intimidate 'crack' dealers." Vol. III, at 808 and 812-13. The only other intercepted conversations cited by Trooper Alben in support of the extension application were (1) a message left by Cunningham for a Joe Marino that the accountant had some work for Tuesday and that he should call Felix; and (2) a conversation between Cunningham and a Frank about money owed by Frank to Cunningham. Vol. III, at 808-09, 810-11.

A.D.A. Picknally's application for the extension asserted that there was probable cause to believe that Cunningham and others named in the application, together with other unknown persons, were committing offenses involving gaming (M.G.L. c. 271, § 17), usury (M.G.L. c. 271, § 49), assault and battery by means of a dangerous weapon (M.G.L. c. 265, § 15A) and conspiracy to commit the same. Vol. III, at 784. The designated offenses set forth in the initial warrant did not include usury and assault and battery by means of a dangerous weapon. Judge Sweeney granted the application for an extension on March 17, 1992, finding that there was probable cause to believe that the offenses were being committed. Vol. III, at 775.

Electronic surveillance of the two cellular telephones terminated on April 1, 1992. No further extensions were sought. Seven days later, on April 8, 1992, the original tape recordings, pen register tapes and daily logs were delivered to Judge Sweeney, who caused them to be sealed and turned them over to the custody of Trooper Alben. Trooper Alben then delivered the sealed items to the office of the chief justice of the Superior Court. Vol. III, at 821A-H. See M.G.L. c. 272, § 99N(1).

B. Dillon's Tavern Intercept[s]

On April 17, 1992, A.D.A. Picknally applied for a

warrant authorizing the interception of communications of Cunningham and others occurring within an establishment known as Dillon's Tavern. Vol. I, at 8. The supporting affidavit from Trooper Alben relied in part on evidence obtained directly and indirectly from the prior cellular telephone interceptions. Vol. I, at 81-82. That same day, Judge Sweeney issued a Warrant and Order, the import of which is at issue at this time, that referred to both oral and wire communications and authorized the interception of communications involving illegal gaming and usury. Vol. I, at 1. A separate order directed the New England Telephone Company to provide "such technical assistance as is necessary [to] accomplish the oral interceptions of the communications from this stated location unobtrusively and with a minimum of interference with the service that you are according to the telephone customers." Vol. I, at 7A.

On May 14, 1992, A.D.A. Picknally applied to Judge Sweeney for an order granting the state an additional seven days to make secret entry into Dillon's Tavern to install the necessary interception equipment. Vol. I, at 86. As set forth in the supporting affidavit of Trooper Alben, the state police were unable to install the necessary equipment within the time permitted by the April 17, 1992 warrant. Vol. I, at 88. Judge Sweeney granted the application for additional time and gave the State Police until May 24, 1992 to install such equipment. Vol. I, at 85.

After the interception equipment was installed in Dillon's Tavern and interception had begun, A.D.A. Picknally applied for ten consecutive extensions of the warrant. Vol. I, at 102, 144, 198, 242, 292; Vol. II at 350, 405, 464, 534, 589. Each application for a subsequent extension was accompanied by an affidavit of Trooper Alben setting forth the results of the prior interceptions. Judge Sweeney granted each application for an extension. As with the initial warrant, the first four

extension warrants authorized the interception of communications involving illegal gaming and usury. Vol. I, at 94, 136, 190, 234. The fifth through tenth extension warrants authorized, in addition, the interception of communications involving assault and battery by means of a dangerous weapon. Vol. I, at 284; Vol. II, at 342, 397, 456, 526, 581.

Pursuant to the tenth extension, surveillance at Dillon's Tavern terminated on November 1, 1992. Four days later, on November 5, 1992, 125 cassette tapes and all documents relative to the surveillance at Dillon's Tavern were returned to Judge Sweeney. That same day, the Chief Justice of the Superior Court ordered the materials sealed in his office in Boston. Vol. II, at 642LL.

C. Indictment

On April 21, 1995, a grand jury sitting in the Federal District of Massachusetts, Springfield Division, returned an indictment charging Cunningham with RICO and RICO conspiracy, 18 U.S.C. § 1962© and (d), as well as loansharking and loansharking conspiracy, 18 U.S.C. §§ 892 and 894. Co-Defendants Brian Hoyle ("Hoyle") and Thomas Ferris ("Ferris") were charged with loansharking conspiracy.

Report and Recommendation at 2-9.

III. STANDARD OF REVIEW

A district court reviews de novo those portions of a magistrate judge's report and recommendation to which a party has specifically objected. 28 U.S.C. § 636(b)(1)(C). Upon review, the court may accept, reject or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions. Id.

IV. DISCUSSION

Before the Court is defendants' motion to suppress the evidence obtained as a result of the surveillance of the two cellular telephones and at Dillon's Tavern. As stated above, the Magistrate Judge recommended that the Court grant defendants' motion in part and deny it in part. Specifically, he recommended that the evidence obtained as a result of the surveillance at Dillon's Tavern should be suppressed, while the evidence obtained as a result of the cellular telephone interceptions should stand. Objections to the Magistrate Judge's rulings have been lodged regarding both batches of evidence--the cellular telephone intercepts and the Dillon's Tavern intercepts--so the Court will review each lot of evidence separately, while considering the parties' objections as they arise.

A. The Interception of Communications Over the Two Cellular Telephones

Defendants raise various objections to the Magistrate Judge's recommendation that their motion to suppress be denied with respect to the interception of communications over the two cellular telephones. The Court will address their objections, seriatim.

1. "Necessity" Requirement

The procedures for interception of wire, oral or electronic communications is set out in 18 U.S.C. § 2518 ("section 2518").[1] Each application for an order authorizing an interception must contain

> a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. . . .

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1 While the evidence at issue in this case was obtained by Massachusetts law enforcement personnel under state warrants, defendants' motion to suppress is analyzed under federal law since this is a federal prosecution. See United States v. Sutherland, 929 F.2d 765, 771 (1st Cir.), cert. denied, 502 U.S. 822 (1991).

18 U.S.C. § 2518(1)(c). Moreover, the judge issuing the order must make an independent determination that this standard has been met. 18 U.S.C. § 2518(3)(c). These safeguards are "designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." United States v. Ashley, 876 F.2d 1069, 1072 (1st Cir. 1989), quoting United States v. Kahn, 415 U.S. 143, 153 n.12 (1974).

Here, defendants object to the Magistrate Judge's reasoning that the warrant application and affidavit supporting it need not show that conventional investigative techniques "have been wholly unsuccessful." See Defendants' Objections to Report and Recommendation with Regard to Defendants' Joint Motion to Suppress Wire and Oral Communications Intercepted by Electronic Surveillance (Docket no. 84) ("Defendants' Objections") at 2. Defendants also assert that the Magistrate Judge erred in determining that Trooper Alben's affidavit, filed in support of the wiretap application, showed the limitations, inutility, or unavailability of other investigative techniques. See id. Lastly, defendants object to the Magistrate Judge's conclusion that the facts detailed in the application were more than adequate to support Judge Sweeney's determination that normal investigatory procedures reasonably appeared to be unlikely of further success. See id. at 3.

In support of their objections, defendants maintain that the traditional investigatory techniques employed by law enforcement personnel had been "extraordinarily successful." See id. at 4. Steve Linial detailed Cunningham's gaming operation while confidential informants kept the police apprised of Cunningham's moves. See id. at 4-5. Officers executed "a slew of search warrants, found a pile of gaming evidence, and arrested a slew of people allegedly working for Cunningham." Id. at 5-6.

The Court rejects defendants' objections. The First Circuit has declared:

> Nor is the government forced to run outlandish risks or to exhaust every conceivable alternative before requesting authorization for electronic surveillance. . . . [T]he issuing court may take into account affirmations which are founded

in part upon the experience of specially trained agents. . . .

Ashley, 876 F.2d at 1072 (internal citations omitted). Moreover, the authorizing court may consider the nature of the alleged crimes as well as the craftiness and wariness of the intended targets when deciding whether to authorize electronic surveillance. See id. at 1072-73.

According to his affidavit, Trooper Alben had extensive experience investigating illegal gaming and organized crime. See Vol. III, at 666-70. He understood, and conveyed to Judge Sweeney via his affidavit, the intricacies of an illegal gaming hierarchy. See Vol. III, at 670-81. Trooper Alben's affidavit suggested that the targets of the investigation were savvy, having been under scrutiny for years. See Vol. III, at 682-89. In fact, as defendants acknowledged in their memorandum, notwithstanding the heat that was coming down on Cunningham, Alben's affidavit "showed that he was continuing to conduct business as usual." See Defendants' Objections at 5-6.

Because of the layers allegedly involved in the organization here, the Court believes that any criminal activity was "inherently difficult to detect and present[ed] formidable problems in pinning down the participants and their roles[; therefore] investigative personnel must be accorded some latitude in choosing their approaches." See United States v. David, 940 F.2d 722, 728 (1st Cir. 1991), cert. denied, 504 U.S. 955 (1992). To this end, Trooper Alben expressly dismissed, for various reasons, alternative investigatory techniques. These included locating witnesses to testify against defendants, placing an undercover officer into the organization, interviewing subjects of the investigation, and empaneling a grand jury. See Vol. III, at 767-69. And while other techniques had been employed with some success--subpoenaing telephone records, conducting physical surveillances and spot checks, executing search warrants--Trooper Alben acknowledged that these were insufficient to ensure conviction for the criminal activities under investigation. See Vol. III, at 769-71; see also David, 940 F.2d at 727-28 (government must make reasonable, good faith effort to run gamut of normal investigative techniques).

In sum, the Court concludes that Trooper Alben's affidavit sufficiently indicated "a 'reasonable likelihood' that alternative

techniques would fail to expose the crime." Ashley, 876 F.2d at 1073. Accordingly, Judge Sweeney's findings that, "Normal investigative procedures either have been tried without success or reasonably appear unlikely to succeed if tried" were well-supported. See Vol. III at 645, 777. Therefore, section 2518's necessity requirement was met.

2. Interception of Other Crimes

Illegal gaming and conspiracy to commit the same were the offenses specified in the original warrant of February 28, 1992. See Vol. III, at 646. The Magistrate Judge found that the interception of evidence of crimes not named in the original warrant was incidental to the lawful interception of evidence of illegal gaming and conspiracy. Report and Recommendation at 17. Defendants object to this finding. See Defendants' Objections at 6. Also, defendants contest the Magistrate Judge's conclusion that Judge Sweeney was informed of the essential facts of the unspecified violations when A.D.A. Picknally sought an extension of the warrant on March 17, 1992, and Judge Sweeney therefore implicitly found that the contents of the "other offense" conversations were intercepted in accord with Title III. See id. at 6-7. In addition, defendants oppose the Magistrate Judge's rejection of their argument that the extension warrant could not constitute retroactive judicial approval since the extension warrant itself was defective. See id.

In support of their objections, defendants argue that none of the conversations intercepted during the period of the February 28, 1992 warrant had anything to do with gaming. See id. at 7. For example, the police intercepted a conversation on March 4, 1992 concerning collecting money owed on a debt. See Vol. III, at 804-05. Defendants maintain that nowhere in the conversation is there any indication--cloaked, veiled, covert or otherwise--that the debt was connected with gaming. See Defendants' Objections at 8. Trooper Alben's attempt to connect the conversation with gaming, so defendants assert, is extremely tenuous. See id.

Continuing, conversations dated March 12, 1992 and March 16, 1992 involved, by Trooper Alben's own statement, an attempt by Cunningham "to intimidate 'crack' dealers and keep them away from" a particular location in Springfield. See Vol. III, at 807-08. Again,

defendants challenge Trooper Alben's effort to connect this conversation to gaming: "[T]he fact that [Cunningham] can organize and deploy persons quickly for the sole intent in [sic] assaulting and intimidating others for some obvious self interest is consistent with activities surrounding illegal gaming and 'loansharking.'" See Defendants' Objections at 8; see also Vol. III, at 808.

There was a March 13, 1992 interception, which, according to defendants, has no relevance. See Defendants' Objections at 9. In the March 13, 1992 conversation, Cunningham leaves a message for Joe Marino to pick up some work on Tuesday from "Dickie the accountant" and to "call Felix." See Vol. III, at 808-09. Finally, there was a March 14, 1992 intercepted conversation dealing with a debt. Defendants observe that Trooper Alben conceded that the conversation suggests practices consistent with loansharking, an offense for which officers did not have authority to wiretap. See Vol. III, at 810-11. Trooper Alben's attempt to connect this conversation to gaming--loansharking "is a practice which is commonly employed by persons who are involved in the upper levels of organized illegal gaming enterprises"--is, in defendants' words, "hardly enough to bring it within the scope of the warrant." See Vol. III, at 811-12; Defendants' Objections at 9.

The Court believes that defendants' arguments miss the point. Defendants focus on the intercepted communications' relation to gaming, the targeted offense. However, provided certain safeguards are met, Title III clearly allows for the interception of crimes other than those specified in the warrant:

> Congress intended that evidence relating to unauthorized offenses should be given retroactive judicial approval under [18 U.S.C.] section 2517(5) if the "original [wiretap warrant] was lawfully obtained,
>
> . . . was sought in good faith and not as a subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order."

United States v. McKinnon, 721 F.2d 19, 22 (1st Cir. 1983) (emphasis supplied) (quoting S. Rep. No. 1097, 90th Cong., 2d Sess.

reprinted in 1968 U.S. Code Cong. & Admin. News 2112, 2189). Here, there is no suggestion that the warrant in question, authorizing investigation of gaming, was a subterfuge designed merely to sanction an investigation of loansharking, usury, assault and battery, or any other crime. In fact, any intimation that the warrant was a subterfuge is non-sensical since extortion is an enumerated offense for which law enforcement personnel could have sought a warrant in the first instance. See 18 U.S.C. § 2516(1)(f); see also United States v. London, 66 F.3d 1227, 1234 (1st Cir. 1995), cert. denied, 64 U.S.L.W. 3704 (1996); 18 U.S.C. §§ 891-894 (defining extortionate credit transaction as combination of usury and violence).

As for whether the communications regarding non-targeted offenses were intercepted incidentally to a lawfully executed order, the Court concludes that they were. The First Circuit has declared that something need not be unanticipated to be incidental. See McKinnon, 721 F.2d at 22-23. Evidence of crimes other than those authorized in a wiretap warrant are intercepted incidentally when they result from a bona fide investigation of crimes specified in a valid warrant. See id. at 23. Here, because the warrant authorizing the interception of gaming communications was valid, the interception of communications regarding other crimes was incidental. See United States v. Gambale, 610 F. Supp. 1515, 1531 (D. Mass. 1985).

The Court's analysis does not end there. Whether non-targeted crimes were intercepted incidentally to a lawful warrant is only half the question. The government may only disclose the contents of the incidentally intercepted offenses when the interception is subsequently approved or authorized by a judge of competent jurisdiction. 18 U.S.C. § 2517(5). Specifically, Title III provides that when law enforcement personnel, while engaged in authorized surveillance, intercept

> communications relating to offenses other than those specified in the order of authorization or approval, the contents and evidence derived therefrom . . . may be used . . . when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the

> provisions of this chapter. Such application shall be made as soon as practicable.

18 U.S.C. § 2517(5). The judicial finding that the interception was otherwise in accord with Title III may be implicit, such as when a judge "grants a renewal of a wiretap after being advised of the essential facts of the unspecified violation." McKinnon, 721 F.2d at 23-24. In other words,

> [T]he disclosure in subsequent affidavits to the issuing judge of material facts constituting or clearly relating to other offenses satisfies the Government's obligation to seek judicial authorization for the disclosure and use of evidence inadvertently intercepted.

London, 66 F.3d at 1235 (quoting McKinnon, 721 F.2d at 24).

Judge Sweeney gave implicit authorization here. The extension warrant expressly found probable cause to believe that usury and assault and battery by means of a dangerous weapon were occurring; whereas the original warrant only cited probable cause regarding gaming and conspiracy to commit gaming. Compare Vol. III, at 775-76 with Vol. III, at 643-44. Moreover, when the government sought the March 17, 1992 extension, Trooper Alben's attached affidavit advised the court of interceptions suggesting loansharking:

> These above stated practices of paying money to third parties, leaving money at various locations (with Lori, at Dillons and at the Orange Cafe) is consistent with the practices of loansharking. . . . This conversation lends itself to believe that probable cause exists to believe this is a loansharking or usury situation. . . .

Vol. III, at 811. Additionally, transcripts of the recorded conversations, and Trooper Alben's interpretation of the conversations, were before Judge Sweeney when she reviewed the application for the extension warrant. Vol. III, attachments starting after 817; cf.

Gambale, 610 F. Supp. at 1531 (judge need not engage in conversation-by-conversation analysis when authorizing disclosure under section 2517(5)).

At bottom, the Court finds that the interception of crimes not specified in the February 28, 1992 warrant was incidental to the lawful interception of evidence relating to gaming and conspiracy to commit gaming. Also, the Court believes that Judge Sweeney was informed of the essential facts regarding the non-targeted offenses when she issued the extension warrant on March 17, 1992, so she implicitly found the incidental intercepts to be in compliance with Title III. As for defendants' claim that the extension warrant could not constitute retroactive judicial approval pursuant to section 2517(5) because the extension warrant itself was invalid, the Court turns to consider that now.

3. The Extension Warrant

Finding probable cause to exist with respect to gaming, usury, and assault and battery by means of a dangerous weapon, Judge Sweeney issued an extension warrant on March 17, 1992. See Vol. III, at 775-76. The Magistrate Judge concluded that Judge Sweeney was justified in finding probable cause, and defendants now object to the Magistrate Judge's conclusion. See Report and Recommendation at 21; see also Defendants' Objections at 10. Also, defendants take issue with the Magistrate Judge's statements that,

> First, given the initial affidavit, a fair inference could well have been drawn by Judge Sweeney that the debt collection concerned a gambling debt. Second, even if the conversations intercepted during the period of the February 28, 1992 warrant did not pertain to gaming, such a conclusion would not preclude a finding of probable cause with respect to gaming for the extension warrant.

Report and Recommendation at 21-22; see Defendants' Objections at 10.

Defendants hinge their argument on the fact that the original cellular telephone interceptions yielded no evidence of gaming. See

supra (discussing intercepts dated March 4, 1992; March 12, 1992; March 13, 1992; March 14, 1992; March 16, 1992). They contend that since Cunningham did not discuss gaming during the period of time covering the first warrant, there was no probable cause to continue to eavesdrop in an effort to intercept gaming conversations. See Defendants' Objections at 11. While defendants' position is attractive, the Court is not convinced.

Section 2518 requires that extension warrants, like original surveillance warrants, can be issued only if the judge determines that

> (a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in [Title III];
>
> (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;
>
> . . . .
>
> (d) . . . there is probable cause for belief that the facilities from which, or the place where, the wire, oral or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

18 U.S.C. § 2518(3); see also 18 U.S.C. § 2518(5) (referring to subsection (3) for extension warrants). The quantum of probable cause needed in the electronic surveillance context is the same as that for a standard search warrant. See United States v. Gambino, 734 F. Supp. 1084, 1097 (S.D.N.Y. 1990). Therefore, review of the law that has developed with respect to search warrants, in general, is instructive. See id. at 1098.

Probable cause is "a fluid concept--turning on the assessment of probabilities in particular factual contexts--not readily, or even

usefully, reduced to a neat set of legal rules." Illinois v. Gates, 462 U.S. 213, 232 (1983). Probable cause consists of facts and circumstances that would lead a reasonably prudent person to believe that criminal activity was afoot. See Beck v. Ohio, 379 U.S. 89, 91 (1964). The existence of probable cause is to be determined in a pragmatic, non-technical way based on the totality of the circumstances. See Gates, 462 U.S. at 230-32. The reviewing court's task is to "ensure that the magistrate had a substantial basis for concluding that probable cause existed." Id. at 238-39. The determination of whether probable cause existed is to be given "great deference" on review. Id. at 236.

Judge Sweeney had a substantial basis for concluding that probable cause existed. As discussed earlier, Trooper Alben's affidavit contained written transcripts of intercepted conversations which, in the Court's view, establish probable cause by themselves. For example, the following dialogue between Cunningham ("RC") and Brian Collins ("BC") would lead a reasonably prudent person to believe criminal activity was afoot:

RC: See, I figure like more than half by tomorrow . . . balance Saturday.

BC: Well, I should have three quarters in my hand by tomorrow.

RC: OK . . . If you don't you know what to do.

BC: Right . . . Oh Yea.

RC: I mean . . . that's . . . ya know . . . we're holding . . . we're letting him slide on the rest.

. . . .

BC: He said there should be no . . . difficulty.

RC: No, but if there is, just put him to the side.

Vol. III, at Attachment B (after pg. 817). Another conversation between Cunningham ("RC") and "Brian" further suggests illegal activity:

> Brian: Nothing happened this afternoon[?]
>
> RC: Well we went there, we had it perfect.
>
> Brian: What happened[?]
>
> RC: Well we followed them around the corner, right[?]
>
> Brian: Ya.
>
> RC: And ah had them perfect, we gave them a couple of good . . . . We were going to grab one and bang him.

Vol. III, at Attachment C (starting after 817). Fortunately for the "them" in this dialogue, a traffic accident ensued, bringing the police and foiling Cunningham's attempts to "grab one and bang him."

The Court need not continue, as these conversations alone suggest, at a minimum, the use of violence to secure money from people. When considering the rest of Trooper Alben's affidavit, there was more than ample evidence to merit a finding of probable cause regarding usury and assault and battery by means of a dangerous weapon.

And, the fact that the original wiretap revealed little in the way of illegal gaming is not, to defendants' disappointment, dispositive. Rather, "the past success of the wiretap is but one factor in determining whether probable cause continued to exist that evidence might be gathered in the future." Gambino, 734 F. Supp. at 1104. Trooper Alben's affidavit in support of the extension warrant expressly incorporated by reference his affidavit in support of the original warrant. Vol. III, at 801. The facts and circumstances detailed in his original affidavit sufficiently established probable cause

to believe that illegal gaming was occurring, and those facts and circumstances applied with equal force at the time of the extension warrant. See United States v. Rivera, No. 90-CR-137, 1990 WL 153969, *3 (N.D.N.Y.) ("[A]s the first warrant was adequately supported by probable cause, the evidence obtained as a result of the extension warrant will not be suppressed"). Given all the circumstances in this case, when Judge Sweeney issued the March 17, 1992 extension warrant, probable cause existed with respect to gaming, usury, and assault and battery by means of a dangerous weapon.

4. Sealing of the Evidence

The wiretaps on the cellular telephones ended on April 1, 1992. Seven days later, on April 8, 1992, the tape recordings of the intercepted conversations, the pen register tapes, and the daily logs were presented to, and sealed by, Judge Sweeney. Defendants argued before the Magistrate Judge that the seven-day delay was a violation of section 2518(8)(a), thereby requiring suppression. See Report and Recommendation at 22. The Magistrate Judge disagreed, and now defendants object to the Magistrate Judge's reasoning and conclusion. Id. at 25-26; Defendants' Objections at 11-16.

Section 2518(8)(a) provides, in pertinent part:

> Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. . . . The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom. . . .

In construing this subsection, including its self-contained exclusionary rule, the Supreme Court has concluded that it "applie[s] to a delay in sealing, as well as to a complete failure to seal, tapes." United States v. Ojeda Rios, 495 U.S. 257, 264 (1990).

Because the Massachusetts electronic surveillance statute does not

require sealing, the Supreme Judicial Court ("SJC") has held that sealing "should be utilized in order to conform the State provision to that of [section] 2518(8)(a)." Commonwealth v. Vitello, 367 Mass. 224, 267-68, 327 N.E.2d 819, 844 (1975). Further, in order to reconcile the federal statute's requirement that, on expiration of the order, tapes must be made "immediately" available to the issuing judge with the state statute's requirement that return be made "within seven days," the SJC has held, "[S]even days is the outside limit on return of the warrant and is not to be read as sanctioning a delay in return if it is practicable that a return be made before expiration of the seven-day period." Id. Compare 18 U.S.C.
§ 2518(8)(a) with Mass. Gen. Laws ch. 272, § 99(M). Responsively, the First Circuit has stated that, "[T]here is no untenable conflict between the state scheme and the federal scheme." United States v. Mora, 821 F.2d 860, 863 n.3 (1st Cir. 1987).

Where, as here, sealing is other than immediate, the recordings and all derivative evidence must be suppressed unless the government can establish a "satisfactory explanation" for the delay. 18 U.S.C. § 2518(8)(a). In this regard, the government must first show, by clear and convincing evidence, that the tapes have not been compromised. See Mora, 821 F.2d at 867. Then the government must "explain not only why a delay occurred but also why it is excusable." Ojeda Rios, 495 U.S. at 265. In clearing this hurdle, the government must establish that it has acted in good faith; that is, the government cannot have benefitted unduly from the delay, and the delay cannot have prejudiced the defendants. See Mora, 821 F.2d at 868. Finally, the Court also considers the length and the cause of the delay. See id. at 868-69.

Here, there is no suggestion that the tapes were sullied. Nor do defendants contend that the delay prejudiced them or unduly benefitted the government. As for the length of the delay, seven days elapsed before the seal was affixed. As stated above, although this length of time is not to be sanctioned if an earlier return is practicable, seven days is the outside limit. See Vitello, 367 Mass. at 267-68, 327 N.E.2d at 844; see also Mora, 821 F.2d at 863 n.3.

The Court turns to what it believes is the dispositive factor, the

cause of the delay. In this case, Trooper Alben acknowledged that the tapes could have been prepared and returned within a day or two. See Hearing Before Magistrate Neiman, Dated February 29, March 1, March 6, 1996, Log II, at 395 (hereinafter "Log __, at __"). However, the return was not made for seven days because of law enforcement personnel's belief that the law enabled them to a full seven days. See Log I, at 192 (A.D.A. Picknally believed he had seven days to return the tapes for sealing).

Defendants maintain that the government's excuse for the delay, a belief that it had seven days to make the return, must be rejected because it was not objectively reasonable at the time. See Ojeda Rios, 495 U.S. at 266. That is, caselaw clearly established that a delay should not be sanctioned if an earlier return is practicable. See Vitello, 367 Mass. at 267, 327 N.E.2d at 844. However, the Court reiterates that seven days is the outside limit, and the government was within this timeframe. See id. Equally compelling is the fact that,

> in responding sluggishly to his . . . responsibilities vis-a vis presentation of the evidence for judicial sealing, [A.D.A. Picknally] acted in ignorant bliss and negligently but . . . he was not consciously or deliberately failing to perform his duty, nor was he acting in bad faith.

See Mora, 821 F.2d at 870 (internal quotations omitted).

In the end, the Court believes that the seven-day delay in seeking the judicial seal does not necessitate suppression. The integrity of the tapes was unaffected; the tardiness neither benefitted the government nor disadvantaged the defendants; and there was no deliberate flouting of the law. See id.; cf. United States v. Gigante, 538 F.2d 502, 504-07 (2d Cir. 1976) (suppression ordered when delays ranged from eight to twelve months).[2]

In sum, the Court concludes that the evidence gathered as a result

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2 Defendants also argue that the government failed to comply with the sealing procedures in regard to the Dillon's Tavern intercepts. The Court will address this issue, infra, when reviewing the Dillon's Tavern surveillance.

of the interception of communications over the cellular telephones comported with Title III. Defendants' motion to suppress that evidence will, therefore, be denied.

B. The Interception of Communications at Dillon's Tavern

Defendants raised various challenges to the legality of the Dillon's Tavern intercepts. In reviewing defendants' attacks, the Magistrate Judge concluded that Title III's particularity requirements, as provided in section 2518(4)(b), were not met. See Report and Recommendation at 36-40. Therefore, he recommended that the interceptions recorded as a result of the April 17, 1992 warrant, and its ten extensions, be suppressed. See id. at 40, 48. The government has filed timely objections to the Magistrate Judge's recommendation of suppression.[3] See Government's Objections to Magistrate Judge's Report and Recommendation with Regard to Defendants' Joint Motion to Suppress Wire and Oral Communications Intercepted by Electronic Surveillance ("Government's Objections").

1. Particularity Requirements

Section 2518(4)(b) states:

> Each order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter shall specify--
>
> . . . .
>
> the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted. . . .

In analyzing these requirements, the Magistrate Judge found that the April 17, 1992 warrant failed to adequately describe "the nature . . .

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3 Defendants have also objected to various findings of the Magistrate Judge in regard to the Dillon's Tavern interceptions. However, the Court will only address these objections if it does not adopt the Magistrate Judge's recommendation of suppression.

of the communications facilities as to which . . . authority to intercept is granted." See Report and Recommendation at 36.[4] In particular, the Magistrate Judge concluded that it was unclear whether the warrant authorized the interception of oral communications occurring inside Dillon's Tavern or of wire communications occurring over a telephone inside Dillon's Tavern. See id. at 36-40. The government objects to these findings.

Although the government objects to the Magistrate Judge's conclusion, the government agrees with the standard of review announced by the Magistrate Judge. See Government's Objections at 3-4. The Magistrate Judge reasoned that a court reviewing a warrant through the lens of section 2518(4)(b) should use an objective standard:

> The Court must look at the warrant to determine if a reasonably prudent law enforcement officer, reading the warrant with some diligence, would understand . . . the nature and location of the communication facilities or the place where communications were to be intercepted, as required by 18 U.S.C. [section] 2518(4)(b). Nothing should be left to the discretion of the officer executing the warrant.

Report and Recommendation at 35 (citing Marron v. United States, 275 U.S. 192, 196 (1927)). The government urges the Court to apply this standard and determine that the warrant does indeed sufficiently particularize the nature of the communication facilities as to which authority to intercept was granted. See Government's Objections at 4-5.

The Court turns to the warrant. Its title is unambiguous:

IN RE: THE APPLICATION OF THE HAMPDEN

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4 The Magistrate Judge also found that the warrant adequately particularized the type of communication sought to be intercepted. See Report and Recommendation at 35-36; see also Vol. I, at 4-5 (authorizing interception of communications relating to various offenses). Moreover, he determined that the warrant sufficiently detailed the location of the communication facilities which were to be the subject of the electronic surveillance. See Report and Recommendation at 36; see also Vol. I, at 4 (detailing location of Dillon's Tavern).

COUNTY DISTRICT ATTORNEY FOR AN ORDER AUTHORIZING THE INTERCEPTION OF ORAL COMMUNICATION OF REX W. CUNNINGHAM JR AND OTHERS KNOWN AND UNKNOWN WITHIN AN ESTABLISHMENT KNOWN AS DILLONS TAVERN

Vol. I, at 1 (emphasis added). Moreover, the warrant clearly speaks of oral communications. See Vol. I, at 1-7. That is, the warrant was sought to authorize "the interception of oral communications;" probable caused existed to believe that "oral communications" regarding named offenses would be obtained; and "these oral communications will concern the details of the [illegal gambling] system. . . ." Vol. I, at 1-2.

However, after page two of the warrant, there is no further mention, at least explicitly, of oral communications. Instead, wire communications appears. "[T]he interception of communications from these telephones will provide evidence of these violations." Vol. I, at 3. Further on, the warrant expressly orders the Hampden County District Attorney and law enforcement officers to "proceed forthwith . . . with the necessary interception equipment to intercept wire communications of Rex W. Cunningham Jr." Vol. I, at 4. Later, "[T]his authorization to intercept wire communications shall be executed as soon as practicable. . . ." Vol. I, at 5. Finally, the penultimate sentence of the warrant orders that A.D.A. Picknally shall keep Judge Sweeney apprised of the progress that has been made towards the goal "of this wiretap. . . ." Vol. I, at 7.

The government rightly contends that, notwithstanding these references to wire communications, other language in the warrant is consistent with oral interception. For example, the warrant states, "There is probable cause to believe that Dillons Tavern and locations within Dillons Tavern are being used by Rex W. Cunningham Jr. . . ." Vol. I, at 2-3. Similarly, the title of the warrant speaks of interceptions "within an establishment known as Dillons Tavern." Vol. I, at 1. The government maintains that oral communications occur at or "within" a certain location while wire communications

occur over specified telephone lines.[5] See Government's Objections at 9.

Continuing, the government points to the warrant's language that eavesdropping was limited to "such time that physical surveillances place Rex W. Cunningham within said building involved in communications with others known and unknown . . . ." See Government's Objections at 12; see also Vol. I, at 4. If the warrant were directed at wire communications, the argument goes, this limitation would not have dealt with observations of Cunningham merely conversing at Dillon's Tavern, but rather would have been further limited to times when Cunningham was inside Dillon's Tavern using a telephone. See Government's Objections at 12. Likewise, the government claims that if a wire intercept were intended, the warrant's order that "the identities of all parties who communicate within this establishment shall be reduced to writing . . ." would have specified communications over telephones. See Government's Objections at 15-16; see also Vol. I, at 6A. And, the government looks to the warrant's restriction that "interceptions are to occur only at those times when police surveillances can place Rex W. Cunningham Jr. at the location known as Dillons Tavern where the intercepting device is installed." Vol. I, at 6. "[W]here the intercepting device is installed" clearly, in

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5 A comparison of the definitions of wire communications and oral communications seems to bear out the government's distinction. Wire communications is defined, in part, as

> any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception . . . .

18 U.S.C. § 2510(1). Oral communications is defined, in part, as

> any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.
> . . .

18 U.S.C. § 2510(2).

the government's view, references Dillon's Tavern.

Perhaps the government's sharpest arrow is its asseveration that the warrant here is simply inconsistent with a warrant authorizing a telephone tap. First, the warrant contains a lengthy description of the location of Dillon's Tavern. Vol. I, at 4. Such wording, the government argues, is only necessary for an oral intercept since the statute requires a description of the "place where, authority to intercept is granted." See Government's Objections at 10; see also 18 U.S.C. § 2518(4)(b). For wire intercepts, the government continues, the statute mandates specification of "[T]he nature . . . of the communications facilities as to which . . . authority to intercept is granted." See Government's Objections at 10-11; see also 18 U.S.C. § 2518(4)(b). The nature of the communications facilities, the government asserts, is the telephone number of the targeted wire. See Government's Objections at 10-11. The warrant here was devoid of any telephone numbers.

Next, the government juxtaposes the Dillon's Tavern warrant with the warrant authorizing the cellular telephone intercepts. There, the language merely stated that surveillance was authorized for,

> wire communications of Rex W. Cunningham Jr and others yet unknown, occurring over the telephone numbered (413) 531-4994 and (413) 531-3188, which are located within motor vehicles in the possession of or under the control of Rex W. Cunningham . . . .

Vol. III, at 646. Again, the government maintains that no description of the location of the telephones is necessary when tapping a telephone. See Government's Objections at 11. Rather, the telephone number alone suffices. Moreover, when tapping the cellular telephones, like with all telephone taps, entry into the car where the cellular telephones were located was not necessary. See Vol. III, at 646. Here, however, the warrant authorized a secret entry into Dillon's Tavern "in order to install the necessary interception equipment." Vol. I, at 4.

After review, the Court has no doubt that the law enforcement personnel intended to secure a warrant authorizing an oral intercept.

However, the Court reiterates that the warrant is to be reviewed to determine what a reasonably prudent law enforcement officer, reading the warrant with some diligence, would understand that he was authorized to intercept, oral communications or wire communications. Although the Court agrees with most of the reasoning proffered by the government, it cannot state that a reasonably prudent officer, reading the warrant with some diligence, would conduct the mental gymnastics that the government undertakes in eighteen pages of rationalizing and conclude that oral interception, and not wire interception, was authorized. In fact, Trooper Alben--certainly a reasonably prudent law enforcement officer--testified that, in regard to the application for the warrant, "I don't deny the fact that the words become confusing." Log II, at 398. The Court sees no less confusion with the warrant itself.

Nor does the Court believe that the sloppy wording--what the government labels "clerical errors"--amounts to a mere technical violation of Title III. Rather, the Court cannot help but to wonder whether Judge Sweeney was misled as to the type of communications which were to be intercepted. Cf. United States v. Shields, 783 F. Supp. 1058, 1087 (N.D. Ill. 1991) (any deficiency was minimal because situation at hand was not type where issuing judge was misinformed or misled). Although Trooper Alben's affidavit may not have spoken of wire intercepts, A.D.A. Picknally's application contained numerous references to wire communications. See Vol. I, at 8-21. Moreover, District Attorney Bennett's attestation at the end of the application declared, "The proposed use of electronic surveillance relative to telephones (413) 531-4994 and (413) 531-3188 is consistent with the overall policy followed in Hampden County to eliminate this type of illegal gaming combine. . . ."[6] See Vol. I, at 21. Finally, the Court cannot accept that Judge Sweeney fully understood that the surveillance was limited to oral communications in light of the fact that she ordered New England Telephone Company to provide law enforcement personnel the technical assistance they needed in regard

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6 This declaration was clearly "cut and pasted" from the application for the warrant for the cellular telephone intercepts. See Vol. III, at 664.

to the telephone at Dillon's Tavern with assigned number (413) 739-9212. See Vol. I, at 7A.

At bottom then, the Court concludes that the April 17, 1992 warrant authorizing electronic surveillance at Dillon's Tavern did not satisfy Title III's particularity requirements. Therefore, defendants' motion to suppress the evidence obtained as a result of the April 17, 1992 warrant, as well as the derivative evidence obtained as a result of the ten extension warrants, will be granted.[7] See 18 U.S.C. § 2518(10)(a) (if motion to suppress is granted, contents from intercepted communications, or evidence derived therefrom, shall be treated as having been obtained in violation of Title III).

2. Remaining Issues

Because the Court will grant defendants' motion to suppress with regard to the Dillon's Tavern intercepts, it need not reach defendants' alternative arguments--lodged in the form of objections to the Report and Recommendation--that the sealing of the tapes of the intercepts was improper; see Defendants' Objections at 16; that District Attorney Bennett did not properly authorize the interception; see id. at 19; that the application for the April 17, 1992 warrant failed to establish a reasonable likelihood that alternative investigative procedures would fail; see id. at 25; that the Magistrate Judge's suggested remedy for minimization violations was inappropriate; see id. at 27; that intercepted conversations regarding assault and battery went beyond the scope of the warrant; see id.; and that state officials failed to seek

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7 The government does not object to the Magistrate Judge's conclusion that section 2518(4)(b) is a "central provision" of Title III, so that a violation of that section requires suppression. See Report and Recommendation at 40; see also United States v. Donovan, 429 U.S. 413, 433-34 (1977). See generally United States v. Giordano, 416 U.S. 505 (1974); United States v. Chavez, 416 U.S. 562 (1974). Nor does the government quarrel with the Magistrate Judge's analysis of the good faith exception in the Title III context. See Report and Recommendation at 41. Accordingly, the Court need not address these issues.

Because Title III requires that evidence derived from improperly intercepted communications should be suppressed, any evidence that the government intends to use in this case that is arguably derived from the Dillon's Tavern intercepts should be subject to a taint hearing.

retroactive authority for use of the intercepted conversations regarding assault and battery. See id. Likewise, the government addresses certain issues left undecided by the Magistrate Judge, namely the minimization and assault and battery issues. The government filed a motion to reconsider these issues that was denied by the Magistrate Judge. See United States of America v. Rex. W. Cunningham, Jr., Brian Hoyle and Thomas Ferris, CR 95-30009-FHF (D. Mass. May 8, 1996) (Neiman, U.S.M.J.). The Court views these additional asseverations as objections to the Report and Recommendation. As with defendants' additional objections, the Court need not reach these arguments.

V. CONCLUSION

For the above-stated reasons, the Court ACCEPTS the Magistrate Judge's Report and Recommendation. Accordingly, defendants' motion to suppress with respect to all electronic intercepts at Dillon's Tavern is ALLOWED, and defendants' motion to suppress with respect to the cellular telephone intercepts is DENIED.

It is So Ordered.

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Senior United States
District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)
	)Crim No.
v.	)95-30009-FHF
	)
REX W. CUNNINGHAM, JR.,	)
BRIAN HOYLE, and	)
THOMAS FERRIS,	)
Defendants	)

ORDER

June 13, 1996

FREEDMAN, S.J.,

In a Memorandum and Order dated May 17, 1996, this Court granted, in part, defendants' motion to suppress wire and oral communications intercepted by electronic surveillance. United States of America v. Rex W. Cunningham, Jr., Brian Hoyle, and Thomas Ferris, CR 95-30009-FHF, slip op. (D. Mass., May 17, 1996) ("Memorandum and Order"). The government has now filed a motion for reconsideration of the Memorandum and Order, and defendants oppose the motion. Also, the government has moved, ex parte, to file an affidavit of Sergeant Timothy P. Alben, and to have the affidavit reviewed in camera and subsequently sealed.

In the Memorandum and Order, the Court held "that the warrant is to be reviewed to determine what a reasonably prudent law enforcement officer, reading the warrant with some diligence, would understand that he was authorized to intercept, oral communications or wire communication." Memorandum and Order at 32. The thrust

of the government's motion to reconsider is that, in determining what a reasonably prudent law enforcement officer would understand that he was authorized to intercept, the Court went beyond the four corners of the warrant. As examples of the Court looking past the warrant, the government cites the Court's reliance on Trooper Alben's confession that the words of the application became confusing: the Court's observation that District Attorney Bennett's attestation in the application related to telephones with assigned numbers (413) 531-4994 and (413) 531-3188; the Court's statement that A.D.A. Carmen Picknally's application contained numerous references to wire communications; and the Court's concern that Judge Constance M. Sweeney may have been misled as to the type of surveillance she was authorizing. See Memorandum and Order at 32-33.

The government's argument for reconsideration misses the point. The decision to suppress hinged upon the Court's review of the warrant. After conduct that review, the Court declared the following :

> [The Court] cannot state that a reasonably prudent officer, reading the warrant with some diligence, would conduct the mental gymnastics that the government undertakes in eighteen pages of rationalizing and conclude that oral interceptions, and not wire interception, was authorized.

Id. at 32. In moving for reconsideration, the government never addresses the issue of what a reasonably prudent law enforcement officer would believe he was authorized to intercept.

To the extent that the Court's Memorandum and Order discussed the points now raised by the government, those issues were not dispostive. The Court looked to Trooper Alben's statement that the application's language was confusing merely to inferentially drive home the confusion of the warrant's language. As for the Court's reference to A.D.A. Picknally's application, and D.A. Bennett's attestation at the end of the application, the Court was demonstrating that the persuasiveness of the errant language suggested that the warrant's sloppy wording reflected more than mere clerical errors. Finally, to the extent that the Court questioned Judge Sweeney's

mindset, the Court was juxtaposing United States v. Shields, 783 F. Supp. 1058, 1087 (N.D. Ill. 1991), where a district court held that any Title III violation was de minimis since the issuing judge was not misinformed or misled. In any event, Judge Sweeney's mindset did not supply the basis for the Court's ruling.

In the end, the Court is satisfied that its Memorandum and Order is sound in all respects. Accordingly, the government's motion for reconsideration is DENIED. The government's motion to file an affidavit of Sergeant Alben is also DENIED.

It is So Ordered

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Senior United States
District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)
	)Crim No.
v.	)95-30009-FHF
	)
REX W. CUNNINGHAM, JR.,	)
BRIAN HOYLE, and	)
THOMAS FERRIS,	)
Defendants	)

MEMORANDUM AND ORDER

July 12, 1996

FREEDMAN, S.J.

In a Memorandum and Order dated May 17, 1996, this Court granted, in part, defendants' motion to suppress wire and oral communications intercepted by electronic surveillance. United States v. Rex W. Cunningham, Jr., Brian Hoyle, and Thomas Ferris, CR 95-30009-FHF, slip op. (D. Mass., May 17, 1996) ("Memorandum and Order"). In an Order dated June 13, 1996, the Court denied the government's motion for reconsideration of the Memorandum and Order. Now the government moves a second time for reconsideration of the Memorandum and Order. Defendants oppose the motion.

In recommending suppression, Magistrate Judge Kenneth P. Neiman ("Magistrate Judge") concluded that even if Title III's exclusionary rule contained a good faith exception, it did not apply to this case. See Report and Recommendation With Regard to Defendants' Joint Motion to Suppress Wire and Oral Communications Intercepted by Electronic Surveillance (D. Mass. March 28, 1996) (Neiman, U.S.M.J.) at 41-44. Because the government failed to object

to the Magistrate Judge's findings regarding the good faith exception, the Court did not address the issue in its Memorandum and Order. See Memorandum and Order at 33-34 n.7. The government now urges the Court to reconsider its decision to suppress in light of the good faith doctrine.

Objections to a magistrate's report and recommendation must be filed with the clerk of the court within ten days of the party's receipt of the report and recommendation. See Rule 3(b), Rules for United States Magistrates in the United States District Court for the District of Massachusetts. Failure to object to a report and recommendation generally precludes further appellate review when the issue is undecided by the district court. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986). Here, even though the government failed to object to the Magistrate Judge's good faith analysis within the proscribed ten days, the Court will nonetheless consider the issue since the remedy of suppression is drastic and since the existence of a good faith exception to the warrant requirement in the context of Title III has yet to be addressed by the United States Court of Appeals for the First Circuit.

Caselaw is split as to whether a good faith exception exists in the Title III context. Compare United States v. Moore, 41 F.3d 370, 376 (8th Cir. 1994) (reasoning that good faith exception applies because Title III's legislative history expresses intent to adopt Fourth Amendment suppression principles), cert. denied, 115 S. Ct. 1985 (1995) and United States v. Malekzadeh, 855 F.2d 1492, 1497 (11th Cir. 1988) (applying good faith exception to Title III electronic surveillance), cert. denied, 489 U.S. 1029 (1989) with United States v. McGuinness, 764 F. Supp. 888, 897 n.2 (S.D.N.Y. 1991) (doubting whether good faith exception applies to wiretaps since exclusionary rule for wiretaps is explicitly commanded by statute). The Court, however, does not need to decide whether the exception applies because, even assuming that it does, the Court is convinced that the exception would not save the evidence based upon the facts of this case.

In United States v. Leon, 468 U.S. 897 (1984), the Supreme Court held that evidence need not be suppressed when police obtain

the evidence through good faith reliance on a subsequently invalidated search warrant. See id.; see also Massachusetts v. Sheppard, 468 U.S. 981 (1984). The Court reasoned that the exclusionary rule is a deterrent measure designed to ensure compliance with the Fourth Amendment. See Leon, 468 U.S. at 906. Since there would often be no deterrent effect when police seize evidence in reliance on a warrant that is subsequently found to be defective, the exclusionary rule serves no purpose in those situations. See id. at 921. However, the exclusionary rule did not lose all of its teeth. Suppression is still warranted when the law enforcement officers knew, or should have known, that the search was improper. See id. at 919.

The practical application of Leon's good faith exception boils down to an evaluation of all the attendant circumstances. While emphasizing that the officer's reliance on the warrant must be "objectively reasonable," the Leon Court also noted that "[i]t is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of [those] . . . who provided information material [to its issuance]." See id. at 922 & 923 n.24.

Here, the Court does not believe that the officers who provided information to the issuing judge, as well as the officers who executed the defective warrant, acted reasonably. Assistant District Attorney Carmen Picknally and Trooper Timothy Alben prepared the application and warrant for the issuing judge's signature, so the errors in the warrant's language were largely attributable to them. See United States v. Ricciardelli, 998 F.2d 8, 16 (1st Cir. 1993) (refusing to find objective good faith when warrant's defects were attributable to the agents); see also Memorandum and Order at 5-6. Moreover, the lack of particularity of the warrant was "glaring and easily correctable" by the law enforcement personnel involved. See Ricciardelli, 998 F.2d at 16 (warrant's facial defect should have been noticed by experienced officers). That is, the warrant contained numerous inconsistencies, amounting to more than technical defects, that were readily observable to experienced law enforcement personnel. See id.; see also Memorandum and Order at 28 (detailing inconsistencies on face of warrant); cf. Sheppard, 468 U.S. at 984,

990-92 (evidence may be used if warrant's defectiveness results from technical errors); Moore, 41 F.3d at 374-76 (judge's failure to sign electronic surveillance order was mere technical defect not meriting suppression).

The First Circuit has cautioned that the good faith exception "will not be applied unless the officers executing search warrants, at the very minimum, act within the scope of the warrants and abide by their terms." United States v. Curzi, 867 F.2d 36, 44 (1st Cir. 1989), quoting United States v. Fuccillo, 808 F.2d 173, 177 (1st Cir.), cert. denied, 482 U.S. 905 (1987). Here, because the terms of the warrant were so ambiguous, the Court does not believe that any officer could abide by the warrant's terms. As the Court concluded in its Memorandum and Order, "it cannot state that a reasonably prudent officer . . . would . . . conclude that oral interception, and not wire interception, was authorized." Memorandum and Order at 32. In this vein, the Court finds Leon's language precisely on point:

> [D]epending on the circumstances of the particular case, a warrant may be so facially deficient--i.e., in failing to particularize the place to be searched or the things to be seized--that the executing officers cannot reasonably presume it to be valid.

Leon, 468 U.S. at 923. Such is the case here; the Court believes that no officer reading the facially defective warrant could have reasonably presumed it to be valid.

For the above-stated reasons, the government's second motion for reconsideration is GRANTED. However, after reconsidering the facts in light of Leon's good faith exception, the Court stands by its earlier Memorandum and Order granting defendants' motion to suppress in part.

It is So Ordered.

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Senior United States July 7, 1997
District Judge